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11 Cal.2d 259

In re BURNETT'S ESTATE.**BURNETT v. BURNETT et al.****L. A. 15551.****Supreme Court of California.****April 29, 1938.****1. Wills ⇐358**

An appeal from an order made nunc pro tunc, purporting to amend a minute order and an order signed and filed the same day admitting two testamentary documents to probate, would be deemed to have been taken from the order admitting the will to probate as amended by the nunc pro tunc order, and hence the order was appealable, notwithstanding that order was made after decree of distribution. Probate Code, § 1240.

2. Wills ⇐371½

An appeal from nunc pro tunc order correcting orders probating a will of 1915 and its codicil of 1925 so as to read that instruments dated October 16, 1925, and May 5, 1927, were probated as testator's will and codicil would not be dismissed on ground that question had become moot by reason of another order, which had become final, probating the instrument dated May 5, 1927, where transcript did not show any proceedings subsequent to nunc pro tunc order.

3. Courts ⇐116(1)**Motions ⇐58**

A trial court upon its own motion or on ex parte application has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment.

4. Judgment ⇐304

A court has no power to amend its decision where the error is inherently judicial rather than clerical or inadvertent.

5. Wills ⇐423

A hearing on a petition for the probate of a will is a "proceeding in rem" binding on all persons interested in the will.

[Ed. Note.—For other definitions of "In Rem," see Words & Phrases.]

6. Wills ⇐339

An order made in proceeding for probate of will is a formal record representing the performance of a judicial act and the exercise of judicial discretion. Code Civ. Proc. § 1704, now Probate Code, § 1221.

7. Wills ⇐206

A will and codicil which were the only testamentary documents properly before

court were properly admitted to probate, notwithstanding existence of another will and codicil, where no petition for probate of the other will and codicil was filed.

8. Motions ⇐56(2)

A recital in a nunc pro tunc order that a clerical error had crept into first order is not conclusive of either the fact or the nature of the error.

9. Appeal and error ⇐1011(1)

A nunc pro tunc order resting upon evidence in which there is a substantial conflict will not be disturbed upon appeal.

10. Appeal and error ⇐1010(1)

The Supreme Court is not bound by trial court's nunc pro tunc order, where facts upon which trial court acted are undisputed and only one conclusion can be drawn from them.

11. Appeal and error ⇐659(3)

Where transcript did not show that original order and nunc pro tunc order which were the subject of the controversy were filed, a motion for diminution of record to allow filing of certified copies of such orders would be granted.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding in the matter of the estate of W. I. Burnett, deceased. From an order made nunc pro tunc purporting to amend a minute order and an order signed and filed the same day bringing two testamentary documents to probate, Lucena Burnett appeals. G. C. Burnett and others are the respondents.

Motion for diminution of the record granted. Order reversed.

For prior opinion, see 70 P.2d 991.

Robert B. Gaylord, of San Francisco, and W. R. Bailey, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondents.

EDMONDS, Justice.

The controversy presented in this case concerns the effect of an order made nunc pro tunc purporting to amend a minute order and an order signed and filed the same day admitting two testamentary documents to probate.

W. I. Burnett died in 1929. His widow, the appellant here, and seven children, survived him. Shortly after his death G. C.

Burnett, a son, filed a petition for probate of a will dated December 24, 1915, and a codicil thereto made October 16, 1925, which were alleged to be "the last will and testament and codicil thereto of said decedent." By the terms of this will and the codicil, which were filed with the petition, the appellant was given one-half of all her husband's estate and G. C. Burnett was appointed "administrator."

On August 16, 1929, another will dated May 5, 1927, was filed. This instrument recited that the testator had deeded to his wife a one-half interest in certain designated real property and the other one-half to "my ayers," naming the seven children, and directed that all other property be divided equally between his wife and the heirs mentioned. No petition for the probate of this later will was filed. Upon a hearing, the petition for the admission of the will of 1915 and its codicil of 1925 was granted by an order in writing signed by the judge and endorsed "Filed Sep 3, 1929."

By subsequent proceedings, administration of the estate was carried to a decree of final distribution which disposed of Mr. Burnett's property in accordance with the probate judge's construction of the will of May 5, 1927. The testator's widow took an appeal from this decree on the ground that the will on which it was based had never been admitted to probate. During the pendency of that appeal, the seven children, without notice to their mother, presented to the probate court an affidavit of the county clerk stating that the order of September 3, 1929, admitting the 1915 will and 1925 codicil to probate was incorrect, and that in fact the order made by the court on that day denied probate of the 1915 will and admitted the 1927 will. Upon this affidavit the court, on March 4, 1935, made an order correcting the minute order of September 3, 1929, and the signed order of the same date, nunc pro tunc to admit the instruments dated October 16, 1925, and May 5, 1927, to probate as the testator's will and codicil. The signed order as corrected still recited that all the allegations of the petition for probate of the 1915 will were true.

This nunc pro tunc order was considered upon the appeal from the decree of distribution, and it was held that the portion of the order purporting to admit the 1927 will to probate was void, no petition having been on file for the admission of that will. In re Estate of Burnett, 6 Cal.App.2d 116, 44 P.2d 435. However, the effect of the order upon

the 1915 will and the 1925 codicil was not passed on. That is the question presented by the present appeal.

[1] There is no merit in the respondents' contention that because the order in question was made after the decree of distribution it is not appealable. This appeal must be deemed to have been taken from the order admitting the will to probate as amended by the nunc pro tunc order. Such an order is appealable. Probate Code, § 1240.

[2] The respondents contend that the issue presented by the present appeal has become moot because the 1927 will is now admitted to probate by another order which has become final. They state that on November 14, 1935, the superior court granted a petition for the probate of the will dated in 1927 and made an order accordingly. However, the transcript on appeal does not show any proceedings subsequent to the order made on March 4, 1935, from which this appeal was taken. Under these circumstances the appeal will not be dismissed.

[3,4] Admittedly a trial court upon its own motion or on ex parte application, has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment. *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412; In re Estate of Willard, 139 Cal. 501, 73 P. 240, 64 L.R.A. 554; *Carter v. J. W. Silver Trucking Co.*, 4 Cal.2d 198, 47 P.2d 733. But where the error is inherently judicial rather than clerical or inadvertent, the court has no power to amend its decision. *Stevens v. Superior Court*, 7 Cal.2d 110, 59 P.2d 988; *Drinkhouse v. Van Ness*, 202 Cal. 359, 260 P. 869; *Egan v. Egan*, 90 Cal. 15, 27 P. 22.

[5-10] The order sought to be amended by the respondents in this case measures up to all the formalities required by section 1704 of the Code of Civil Procedure, now Probate Code, § 1221. A hearing on a petition for the probate of a will is a proceeding in rem, binding on all persons interested in the will. In re Estate of Parsons, 196 Cal. 294, 299, 237 P. 744; In re Estate of Baker, 170 Cal. 578, 585, 150 P. 989. An order made in such proceedings is a formal record representing the performance of a judicial act and the exercise of judicial discretion. The 1915 will and 1925 codicil being the only two testamentary documents of the decedent properly before the court, it had no choice but to admit them to probate. In re Estate of Burnett, *supra*. The recital in the

order made nunc pro tunc that a clerical error had crept into its first order is not conclusive of either the fact or the nature of the error (*Stevens v. Superior Court*, supra, 7 Cal.2d 110, at page 113, 59 P.2d 988), although where such an order rests upon evidence in which there is a substantial conflict, it will not be disturbed upon appeal. *Kaufman v. Shain*, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139. But where the facts upon which the court acted are undisputed and only one conclusion can be drawn from them, the appellate court is not bound by the order made below. Any statement to the contrary in the case of *Kohlstedt v. Hauseur*, Cal.App., 74 P.2d 314, was inadvisedly made and is disapproved.

[11] The appellant has moved for a diminution of the record to allow the filing of a certified copy of the signed order dated September 3, 1929, and a like copy of the order of March 4, 1935, because the transcript does not show that each of them was filed. That omission should be corrected. The motion for diminution is granted and the order appealed from is reversed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; HOUSER, J.



11 Cal.2d 255

MEINCKE v. OAKLAND GARAGE, Inc.,
et al.

S.F. 15918.

Supreme Court of California.

April 29, 1938.

Rehearing Denied May 26, 1938.

1. Automobiles ⇨226(2)

In action for injuries sustained when struck by automobile, where plaintiff was violating ordinance prohibiting "jay walking," and violation of ordinance continued to moment of impact and injury would not have occurred if plaintiff had not violated ordinance, plaintiff's violation became proximate cause of injury as matter of law unless there were facts bringing case within last clear chance doctrine.

2. Negligence ⇨82

If plaintiff is guilty of continuing negligence without which injury would not have occurred, and if as person of ordinary prudence he should have foreseen that injury of that character would be likely to result from his negligence, his continuing negligence is proximate cause of his injury, and will bar recovery unless doctrine of last clear chance supervenes to make his negligence a remote rather than proximate cause.

3. Negligence ⇨76

Where negligence of plaintiff consists of violation of statute or ordinance designed to prevent casualties of the sort which follows, he must be held as a person of ordinary prudence to have foreseen that the violation of law enacted to avoid the happening of such casualty might reasonably result in casualty's occurrence.

4. Trial ⇨329

In action for injuries sustained when struck by automobile where plaintiff was violating ordinance prohibiting "jay walking," and violation continued to moment of impact which would not have occurred if ordinance had not been violated, verdict for plaintiff on grounds that plaintiff's continuing negligence in violation of ordinance was remote cause rather than proximate one, could not be sustained where no instructions applying doctrine of last clear chance were proposed or given.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Vincent Meincke against Oakland Garage, Inc., and others, for injuries sustained when struck by an automobile while violating an ordinance prohibiting "jay walking." From a judgment for the plaintiff, defendants appeal.

Reversed.

Prior opinion, 70 P.2d 228.

Rehearing denied; HOUSER, J., dissenting.

Charles V. Barfield, of San Francisco, for appellants.

C. M. Walter and James R. Agee, both of Oakland, for respondent.

PER CURIAM.

After the decision of this case by the District Court of Appeal, 70 P.2d 228, a

petition for hearing was granted by this court for the purpose of giving further consideration to the legal position of a person who is injured while violating a city ordinance prohibiting "jay walking," we now adopt the opinion written by Mr. Justice pro tempore Dooling as the opinion of this court:

"This is an appeal from a judgment for plaintiff entered pursuant to the verdict of a jury. Shortly after 1 o'clock in the morning plaintiff was walking across East Twelfth street in the city of Oakland near the middle of the block between Sixth avenue and Seventh avenue. At a point near the center line of the street he was struck by an automobile driven by defendant Grant. An ordinance of the city of Oakland prohibited pedestrians crossing this highway except at a crosswalk and plaintiff was admittedly violating the ordinance at the time of his injury. The nearest crosswalk was at the intersection of Sixth avenue and Twelfth street, considerably over 100 feet away. The automobile driven by Grant was proceeding easterly, had crossed Sixth avenue, and was continuing toward Seventh avenue at the time of the impact.

"The principal question presented is whether plaintiff was guilty of contributory negligence as a matter of law. It is conceded by plaintiff that his violation of the ordinance constituted contributory negligence as a matter of law if it proximately contributed to the injury, but he earnestly contends that the question of proximate cause was one for the jury.

[1] "These facts are clear: (1) That plaintiff was violating an ordinance designed to prevent the very character or type of injury which plaintiff received; (2) that the violation of this ordinance continued to the very moment of impact; and (3) that the injury would not have occurred if plaintiff had not been violating the ordinance. Under such circumstances there is no room for reasonable minds to differ and plaintiff's violation of the ordinance becomes a proximate cause of his injury as a matter of law (*Hopkins v. Galland Mercantile Laundry Co.*, 218 Cal. 130, 21 P.2d 553; *Cadwell v. Anschutz*, 4 Cal. 2d 709, 52 P.2d 916; *Leek v. Western Union Telegraph Co.*, 20 Cal. App.2d 374, 66 P.2d 1232), unless there are facts which bring the case within the

last clear chance doctrine (*Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915).

"In *Leek v. Western Union Telegraph Co.*, supra, plaintiff was struck while crossing a street against a stop signal. The court said (page 1233):

"As plaintiff violated both of the foregoing provisions by attempting to cross Pine avenue against the stop signal, * * * she was guilty of negligence per se; and, since the accident would not have occurred, had plaintiff remained on the sidewalk in obedience to the requirements of the California Vehicle Code [St. 1935, p. 93] and city ordinance of Long Beach, her negligence was one of the proximate causes of the accident, and, therefore, she cannot recover for her injuries."

"Plaintiff points to testimony that defendant Grant saw him 75 or 100 feet away, and turned in his direction just before the impact, as justifying a finding that defendants' negligence was the sole proximate cause of the injury. Where plaintiff's negligence continues to the moment of injury and the injury would not have occurred but for such continuing negligence, as here, plaintiff's negligence is one of the proximate causes of the injury unless the doctrine of last clear chance applies. (*Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915; *Center v. Yellow Cab Co.*, 216 Cal. 205, 13 P.2d 918.)

"The Supreme Court states the rule clearly in *Girdner v. Union Oil Co.*, supra (page 917):

"Whether or not, therefore, negligence is the proximate or remote cause is, as above stated, a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lack-

ing, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. * * *

"The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. * * *

"The real question to be determined in considering cases of the character of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, which question is determined by the application of the principles of the doctrine of the last clear chance itself. * * * When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery.'

[2,3] "We have quoted thus at length from the Girdner Case because some of the cases seem to leave in confusion the doctrine of proximate cause in cases where plaintiff is himself continuously negligent to the moment of injury.

"The true rule would seem to be, as deduced from the above-cited cases, that if plaintiff is himself guilty of continuing negligence without which the injury would not have occurred, and if as a person of ordinary prudence he should have foreseen that an injury of that character would be likely to result from his negligence, his continuing negligence is a proximate cause of his injury and will bar a recovery, unless the doctrine of last clear chance supervenes to make his negligence a remote rather than a proximate cause. See on the question of foreseeableness as an element in proximate cause where the

negligence of another concurs to produce the injury *Rauch v. Southern California Gas Company*, 96 Cal.App. 250, 255 et seq., 273 P. 1111; *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 374, 375, 274 P. 544. Where the negligence of the plaintiff consists in the violation of a statute or ordinance designed to prevent casualties of the very sort which follows, he must be held as a person of ordinary prudence to have foreseen that the violation of the law enacted to avoid the happening of such a casualty might reasonably result in the casualty's occurrence. To hold otherwise would be to largely nullify laws which are adopted for the safeguarding of the public from types of injury which are of such frequent recurrence as to lead legislative bodies to adopt regulatory measures to prevent them.

[4] "No instructions were proposed in this case, and hence none given, on the doctrine of last clear chance. Wanting such instructions, the verdict cannot, under the facts, be supported on the ground that plaintiff's continuing negligence in violating the ordinance was a remote cause rather than a proximate one."

The judgment is reversed.



11 Cal.2d 248

PEOPLE v. AGUIRRE.
Cr. 4148.

Supreme Court of California.
April 28, 1938.

1. Criminal law ☞554

In murder prosecution, where accused was only eyewitness to the killing, jury was not bound to believe accused's testimony.

2. Homicide ☞244(1)

Evidence of malice and motive held to justify conviction for murder in the first degree as against claim of self-defense.

3. Homicide ☞300(3)

Instruction on self-defense that accused could use so much force as was necessary

to meet the danger was not erroneous for failure to state that he could use as much force as "to the mind of a reasonable person" was necessary, where balance of instruction plainly supplied the omission.

4. Homicide ☞300(7)

In murder prosecution, instruction that, whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with intent to have adversary act upon it, and he so acts and is killed, plea of self-defense is unavailing, was proper under evidence.

5. Homicide ☞303

In murder prosecution, where accused had engaged deceased in a quarrel on day of killing, and accused had returned to deceased's premises that night and killed deceased, instruction that the taking of human life or the infliction of great bodily injury is not permitted in resistance of a mere trespass on one's property was properly refused as inapplicable to the facts.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Francisco Aguirre was convicted of murder, and he appeals.

Affirmed.

C. W. Benshoof and Thomas Clay, both of Riverside, for appellant.

U. S. Webb, Atty. Gen., and Earl Redwine, Dist. Atty., of Riverside, for the People.

SHENK, Justice.

This is an appeal from a judgment imposing the death penalty and from an order denying a motion for a new trial.

On Sunday, July 25, 1937, at 8:30 p. m., the defendant, a Mexican, 29 years of age, killed Gabriel Contreras, also a Mexican, 38 years of age, by shooting him in the head with a revolver. The homicide occurred at the ranch home of the deceased, located in a sparsely settled section of the desert country about 3 miles from the town of Thermal in the Coachella valley. The deceased was living at his ranch place with his four children, the oldest being 12 years of age, and with the mother of his children, Pilar Gonzales, also known as Pilar Contreras. The deceased and Pilar had lived together

as husband and wife since 1925, although no civil marriage ceremony had been performed.

The deceased had moved with his family from Oasis to the ranch near Thermal about 1 year before the homicide. Shortly thereafter the defendant stopped at that ranch in search of a place to live, whereupon arrangements were made under which the defendant was to live with the deceased and his family while he worked for the deceased or in the vicinity. The defendant agreed to the payment of \$3 a week for his room and board. After the defendant had lived at the Contreras home about 8 months he left at the request of Contreras and went to live on the property of Fabian Salgado, located about a third of a mile from the Contreras place. The defendant there lived in a habitation which he constructed for himself in the brush near the house of Salgado at whose place he ate his meals. The defendant was living on the Salgado place on July 25, 1937, the date of the homicide.

Not long after the defendant moved into the home of the deceased he established an intimate relationship with Pilar, or Mrs. Contreras, as the mother of deceased's children was generally known. This intimacy was carried on at the home of the deceased commencing in January, 1937, and ending on the Friday before the Sunday of the homicide. In March Mrs. Contreras notified the defendant that she was pregnant. The defendant acknowledged responsibility for the woman's condition. When she was about 5 months' pregnant he expressed to a nearby rancher his pleasure at the prospect of having offspring and planned with Mrs. Contreras to leave the home and children of the deceased and to depart for Arizona.

During the time that the defendant was living at the deceased's place the defendant occasionally went to Indio with Salgado in the latter's truck and there purchased provisions for the deceased, which provisions were hauled in that truck to the deceased's home. On the late afternoon of the day of the homicide the defendant went to the deceased's place and told the deceased that it would be only just and right that he, the deceased, should pay Salgado for hauling provisions from Indio to the Contreras house. The defendant did this on his own initiative, for Salgado had not requested or suggested that he

do so, nor had Salgado ever claimed that any compensation was due him for such hauling. No reason appears why the defendant should have made such a request or demand on the deceased for such payment, except, as urged by the prosecution, that the defendant was looking for trouble. At any rate, trouble ensued. During the argument the deceased disclaimed any indebtedness to Salgado and upbraided the defendant with epithets for making such a claim, even going to the extent of chasing the defendant and striking him with a corn knife or machete, without however, causing any serious injuries. The defendant made his retreat by outrunning the deceased and went to the home of Salgado apparently for the purpose of arming himself for a return engagement with the deceased. In the house of Salgado the defendant first armed himself with a butcher knife. Salgado evidently knew or surmised the defendant's purpose in thus arming himself, for Salgado immediately took the knife away from the defendant.

The defendant then repaired to the farmhouse of the Leach family about a quarter of a mile from Salgado's place. He approached Herbert Leach, a young man about 24 years of age, and told him that Fabian Salgado sent him over to borrow a pistol and flashlight to watch for coyotes the next morning. This statement by the defendant to Herbert Leach was not true, for Salgado had not made such a request. Nevertheless Leach delivered to the defendant the pistol, with holster and ammunition, and the flashlight. Whereupon the defendant returned to the Contreras place and took a position on the bank of a large reservoir at a point about 66 feet from the Contreras house. At that place the defendant waited for Contreras to come out of the house, and was prepared to wait there all night, if necessary, in order to see Contreras. He testified that he returned to the Contreras place to see if everything was "peaceful," but that if Contreras "was going to fight with me, we were going to fight." Earlier in the evening Contreras had gone to bed in the house, clothed in shorts only. There were no toilet facilities in the house. At 8:30 o'clock that night he arose and went out of the house and proceeded toward a small reservoir. When he was from 15 to 20 feet from the defendant, the defendant fired two shots from the revolver which he had obtained from Leach.

One of those shots struck Contreras full in the face, just beneath his nose, and after penetrating the head severed the spinal cord. Contreras fell and died immediately. There was no living witness of the event except the defendant. After the killing the defendant proceeded to the home of Salgado, entered the house alone, concealed the gun and scabbard, cartridge belt and flashlight under the mattress of Salgado's bed, and departed. He went to the railroad track and traveled eastward with his intended destination at Jerome, Ariz., where he had some relatives. Two days later he was apprehended at the town of Niland by a deputy sheriff of Riverside county. Upon his arrest the defendant at once admitted that he had shot Contreras and had seen him fall at about the place where the body was found.

[1,2] The defendant contends on this appeal that the evidence was insufficient to establish the crime of murder in that there was no showing of malice or willful, deliberate, or premeditated killing. With this contention we cannot agree. There was sufficient evidence of ill will between the two men. The evidence of the illicit relationship between the defendant and Mrs. Contreras and their purpose to go to Arizona as soon as the defendant could obtain adequate funds was a disclosure of facts from which the jury could imply motive. It is true that the defendant testified that the deceased was the aggressor and pursued him with a machete when he emerged from his house at 8:30 on the night of the killing; that he, the defendant, attempted to flee while being pursued by the deceased wielding the machete, but was unable this time to outstrip the deceased and shot only in his own defense. But the jury was not bound to believe his testimony in this regard, especially in the light of the evidence of his statements to Officer Vivian shortly after his arrest that "I didn't run at all. That is the truth." The many contradictory statements of the defendant as to why he returned to the Contreras place, and the facts and circumstances attending the affair and related by other witnesses, placed with the jurors the power and responsibility of selecting the evidence which, in their judgment, conformed to the truth. We do not feel justified in disturbing their conclusions impliedly expressed by their verdict that the defendant desired to possess

and take away the putative wife of the deceased; that ill will was engendered between the deceased and himself, at his instigation and without sufficient cause, on the afternoon of July 25; that with evil purpose and deliberation he attempted openly but without success to arm himself with a butcher knife at the home of Salgado; that by cunning, misrepresentation, and falsehood he later obtained the lethal weapon from Herbert Leach; that he then and after nightfall returned to the house of the deceased and there, at a convenient place, lay in wait for his victim, with the expressed intention of waiting all night if necessary to accomplish his purpose; and that the evidence in support of the defendant's plea of self-defense was not so conclusive under all the circumstances as to preclude a denial of the plea.

[3] The defendant complains of certain portions of instruction No. 12. Particularly it is contended that error appears in the following language included in said instruction on self-defense: "In the effort to save his own [life], or to avoid the infliction of great bodily injury upon him, the person in danger, real or apparently real, may use so much force as is necessary to meet such danger and no more. If he goes beyond this limit, he transcends the law of self defense, and becomes himself a wrongdoer." It is claimed that such language requires the defendant at his peril to determine the amount of force necessary to meet the danger. The contention is that the instruction is fatal because it did not include the italicized words in the following sentence: "may use so much force as *to the mind of a reasonable person*, is necessary to meet such danger and no more." The instructions might well have included the phrase which the defendant claims should have been included; but its omission did not constitute prejudicial error, when the balance of the instruction is taken into consideration, wherein it was very plainly indicated to the jury that the action of the defendant, on his plea of self-defense, should be tested by what a reasonable man would do under like circumstances.

[4] Instruction No. 13 on the subject of self-defense is also criticized, not as a misstatement of the law, but as not applicable to the facts in this case. This instruction told the jury that whenever an assault is brought upon a person by his own procurement, or under an appear-

ance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing. There was evidence that on the late afternoon of the day of the homicide the defendant engaged the deceased in a quarrel; that this quarrel was at the defendant's own procurement and resulted in hostility which he himself created, and it was for the jury to say whether such action by the defendant was for the purpose of having the deceased act upon it.

[5] It is insisted that the court erred in refusing the defendant's proposed instruction to the effect that the law does not permit the taking of human life, or the inflicting of great bodily injury, in the resisting of a mere trespass on one's property. This instruction was offered on the theory that the defendant's presence on the bank of the large reservoir just before the fatal moment was no more than a trespass upon the deceased's property and that the deceased had no right to pursue the defendant with the machete just before the fatal shot was fired. Assuming that the deceased did pursue the defendant in the dark just before he was killed (which the jury apparently believed did not take place), there is no evidence that he was pursuing the defendant because of any trespass by the defendant on the Contreras property. If the pursuit occurred at all, obviously it was because of the ill feeling engendered by the defendant in the late afternoon. The proposed instruction was not applicable to the facts.

It was also contended that the court erred in refusing to give the defendant's proposed instruction No. 15, relating to the subject of a confession. The instruction is set forth in full in appellant's opening brief, but by inadvertence counsel had failed to note that this instruction was given by the court as instruction No. 18.

The defendant was accorded a full and fair trial, was ably represented by counsel appointed by the court for that purpose. But we find no error in the record which would justify a reversal.

The judgment and the order are, and each is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.; HOUSER, J.

In re GAINFORT'S ESTATE.

Appeal of BARRON.

S. F. 15883.

Supreme Court of California.

May 2, 1938.

Rehearing Denied May 26, 1938.

1. Executors and administrators ⇐35(8)

The probate court may revoke letters upon mismanagement by an executor or administrator and has duty to scrutinize accounts of personal representatives. Probate Code, § 521.

2. Executors and administrators ⇐518(6)

Evidence that residuary legatee of non-resident testator was serving a term of imprisonment for embezzlement from persons who held a judgment against him, that judgment creditors' assignee levied execution on legatee's interest in estate, that notice of attachment was filed with clerk of probate court, and that, while officer was trying to locate ancillary administrator, administrator sent practically all funds to foreign executors, justified removal of ancillary administrator and refusal to settle his account. Probate Code, § 521.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Thomas Sherwood Gainfort, also known as Thomas S. Gainfort, also known as T. S. Gainfort, deceased, wherein Nicholas Barron, administrator, filed an account, and Caroline Parish filed exceptions contesting the account. From orders denying the settlement of the final account and revoking letters of administration, the administrator appeals and contestant moves to dismiss the appeal.

Orders affirmed, and motions to dismiss appeal denied.

Llewellyn Toland, William John McMahon, and Theodore Tamba, all of San Francisco, for appellants.

Norman H. Elkington, of San Francisco, for respondent.

LANGDON, Justice.

This appeal is taken from orders of the trial court denying approval, allowance, and settlement of the first and final account of an administration, sustaining exceptions to said account, revoking letters of administration with the will annexed, and directing payment of funds to the successor of said administrator.

Thomas Sherwood Gainfort, died a resident of Dublin, Irish Free State, on August 15, 1932. He left a will which was probated in Dublin. On October 24, 1934, Nicholas Barron was appointed ancillary administrator of the estate in San Francisco. On April 3, 1936, he presented his report and petition for settlement of first and final account, in which it appeared that he had received the sum of \$6,780.83, and after paying certain charges, had remitted the greater part of said sum, \$5,786.91, to the executors in Ireland. Notice of hearing was given, and on April 14, 1936, Caroline Parish filed exceptions and a petition for revocation of letters. She alleged that the decedent left an estate of about \$50,000 value, with property in San Francisco in the amount of \$6,712.36; that one John Gainfort, son of the decedent, was a residuary legatee under the will; that said son was serving a term of imprisonment in San Quentin penitentiary for embezzlement from four persons who held a judgment for \$10,000 against him; that these persons had assigned their claim to her; that she had levied execution on his interest in the estate, and consequently was a person interested and entitled to except to the account.

At the hearing it was disclosed that the deputy sheriff who sought to serve the writ of attachment on the administrator called at his law office on April 16, 1935, and for several days thereafter, but was unsuccessful in locating him. Meanwhile the notice of attachment was filed with the clerk of the probate court, and presumably Mr. Barron, the administrator, was aware of this. On April 17, while the officer was trying to locate him, Mr. Barron sent practically all funds of the estate, namely, the sum of \$5,786.91, to the executors in Ireland. This was before the period for notice to creditors had elapsed, and without notice to anyone, or consent of the court. In the account,

filed nearly a year later, no mention was made of this obvious attempt to escape the levy. It further appeared that John Gainfort, while incarcerated, had made an assignment of his interest in the estate to his wife, for consideration of love and affection, and that she had left the state. Mr. Barron, the administrator, had also departed.

Upon this showing the judge of the probate court, after severely condemning the fraudulent conduct of the parties, denied approval of the account, sustaining exceptions thereto, and revoked the letters of administration. The administrator then brought this appeal.

[1,2] The position of appellant is that we should ignore the above facts and decide the matter on the following technical propositions: First, that the contestant, a mere creditor of a legatee, has no interest sufficient to file exceptions or seek revocation of letters; and, second, that an ancillary administrator may in good faith, after all claims and expenses are paid, transfer funds of the estate to the domiciliary executor or administrator without order of court. The briefs contain considerable discussion of these matters particularly the question whether by the attempted levy of the attachment, petitioner acquired an interest sufficient to seek this relief. However, it is conceded that the court has power itself to revoke letters upon mismanagement by an executor or administrator, Probate Code, § 521, and certainly it is the duty of the court to scrutinize the accounts of the personal representative. We have here a successful effort by the legatee, his wife as gratuitous assignee, and the administrator, to remove funds of the estate from this jurisdiction. The circumstances under which this was done raise an overwhelming inference of fraud, which is not dispelled by the assertion that the administrator acted in good faith. In our opinion, the court was fully justified in removing the administrator and in refusing to settle the account.

The orders appealed from are affirmed. Motion to dismiss appeal is denied.

We concur: EDMONDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; HOUSER, J.

PEOPLE v. BREWER.

Cr. 361.

District Court of Appeal, Fourth District,
California.

May 6, 1938.

1. Witnesses ⇐2(1)

Where an important issue was whether accused's confession was voluntary, refusal to cause subpoena to issue for witness residing in another county who would allegedly testify that a police officer demanded that accused make the confession or the officer would hold the witness as an accessory and that the accused made the confession to keep the witness out of the charge was error. Pen.Code, § 1330.

2. Criminal law ⇐1030(1), 1044

The erroneous refusal to cause a subpoena to issue for a witness residing in another county who would allegedly testify that an officer demanded that accused make a confession, or the officer would hold the witness as an accessory, and that accused made the confession to keep witness out of the charge, did not require reversal, where there was no objection to proceeding or request for continuance when case was called for trial. Pen.Code, § 1330.

3. Criminal law ⇐1036(2), 1169(2)

Any error in permitting district attorney to question accused concerning another crime of which accused had previously been convicted after court stated that the crime could not have been a felony because of the age of the accused at the time was not sufficiently prejudicial to justify reversal, where there were no objections to the questions and the same facts had otherwise been brought out without objection.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Morris E. Brewer was convicted of burglary in the second degree, and, from the judgment and from an order denying a motion for a new trial, he appeals.

Affirmed.

Theo. G. Krumm and Chas. G. Potter, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was convicted by a jury of burglary in the second degree and has appealed from the judgment and from an order denying his motion for a new trial.

A liquor store in San Bernardino was entered early on the morning of January 6, 1938, and between 30 and 40 bottles of whisky, gin, and brandy were removed therefrom, together with 200 pennies. Entrance had been made through a rear window of the building by removing an iron bar and spreading other bars sufficiently to permit a person to pass through the opening. Shortly before 7 o'clock on that morning the appellant made a purchase at a grocery store, paying for the same with 38 pennies. An hour or two later he attempted to sell some whisky at another liquor store, saying he had approximately 25 quarts which he would sell for 50 cents a quart. This was reported to the police and he was taken into custody before noon on that day and identified as the person who had made the purchase with pennies and attempted to sell the whisky. At that time he denied having had anything to do with the burglary, but about two days later he told the officers that on the night in question he had gone to this store with one Lloyd Largent; that they waited until the place closed, which was about 2 o'clock in the morning; that they loosened the bars in the window; and that he went in and took two rolls of pennies and 31 bottles of liquor which he passed out to Largent. Through information furnished by the appellant the officers were taken to a place where the liquor had been secreted, and 26 bottles of liquor were found which were identified as having come from this store.

On January 12, 1938, after having been fully informed of his rights and that anything he said would be used against him, the appellant made what he stated to be a free and voluntary statement to a deputy district attorney which was taken down by a shorthand reporter, at which time he again described in complete detail the manner in which the burglary had been committed. On January 14, 1938, at the preliminary hearing the appellant took the stand, after being fully advised as to his rights, and described in detail the manner in which he had entered the building and taken the liquor and pennies. Largent also took the stand and testified to the same state of facts. At the trial of this

case, however, Largent testified that he had been convicted of committing this burglary, that he had committed the offense alone, and that the appellant had not been present. The appellant testified that he had nothing to do with the burglary; that he had been constantly threatened by one of the officers; that he made his first confession because this officer had demanded that he do so and had threatened to hold three of his friends unless he did confess; and that he remained in fear of this officer at all times until he got into the superior court. He testified, however, that at no time had he had any fear of the district attorney or of the judge who conducted the preliminary hearing, and all of the officers denied that any force or threats had been used.

The first ground for reversal urged is that the court erred in refusing to issue subpoenas for three nonresident witnesses residing at McFarland, in Kern county, to wit: P. J. Cordell, J. C. Cordell, and Ernie Ousley. Four days before the trial the appellant applied for a subpoena for each of these witnesses, each subpoena having attached to it his affidavit stating that the witness was a necessary and material witness for him and that he believed that the attendance of such witness was necessary. None of these affidavits set forth any facts as to which the witness would testify or anything showing the materiality of the evidence that might be thus produced. However, a further affidavit was filed in which the appellant stated that on the occasion of his first confession a certain police officer demanded that he make a statement admitting that he had committed this burglary or that this officer would hold P. J. Cordell, J. C. Cordell, and Ernie Ousley in jail and charge them as accessories to said crime; that the appellant thereupon said that these three persons were friends of his and that, "to keep them out of said charge, the affiant agreed to make said statement"; that P. J. Cordell was present when these things took place; and that he believed that P. J. Cordell, J. C. Cordell, and Ernie Ousley would testify to this state of facts if they were brought to the trial. Each of the subpoenas presented contained an order to be signed by the trial judge in accordance with section 1330 of the Penal Code, but the judge refused to sign these orders.

[1] An important question at the trial was whether or not the confessions made by

the appellant had been freely and voluntarily made. In so far as the proposed witness P. J. Cordell is concerned, the showing made as to the materiality of his testimony was sufficient. We think the appellant was entitled to the presence of this witness and that the court erred in refusing to cause that particular subpoena to issue. Whether it was error to refuse to issue the other two subpoenas need not be here decided.

[2] It does not necessarily follow that any error in connection with these subpoenas was sufficiently prejudicial to justify a reversal. While such might be the result in a close case and under some circumstances a somewhat different situation here appears. It may first be observed that the record discloses no objection to proceeding or request for a continuance when the case was called for trial. While these three persons were not obliged to attend as witnesses in the absence of the order provided for in section 1330 of the Penal Code, the court was not advised that they would not voluntarily appear or that any effort had been made to get them to do so, although the appellant testified that they were the best friends he had. In fact, it appears that they were such good friends that he "believed" that two of them would testify as to what was said at a time when they were not present. In announcing himself ready for trial, under such circumstances, the appellant in effect waived any error in refusing to make the requested orders.

A further consideration is that the testimony sought to be produced went only to the validity of the confessions made by the appellant and, if they were entirely eliminated, his guilt was rather conclusively established by other evidence. The change of story on the part of the appellant and his accomplice came only after Largent had been convicted, and the appellant's testimony relating to threats made by the officer and his constant and continuing fear of that officer even when not in his presence is far from convincing. While it is hard to believe that the jury could have accepted the appellant's explanation of his confession, even with the addition of the evidence which is now in question, it is, of course, true that the question was one of fact for the jury. If it be conceded that the production of this cumulative evidence might have led the jury to believe that these admissions were not voluntarily made,

it can hardly be assumed that the jury would have disregarded the other evidence of guilt, including, in addition to what has been referred to, the fact that the appellant knew how the building had been entered and exactly what had been done to the bars on the window, although he was arrested and confined very shortly after the burglary.

While error appears, a reading of the record does not indicate any miscarriage of justice or any reasonable probability of a different result had the error not occurred.

[3] It is next urged that the court erred in permitting the district attorney to question the appellant concerning another crime of which he had previously been convicted. In his statement to the district attorney, the appellant had stated that he had been in trouble in Texas with respect to a car theft about six years before. On cross-examination at the trial he was asked if he had ever been convicted of a felony and replied that he had not. He was then asked if he had not made a statement in the district attorney's office admitting that he had been convicted of a felony. He replied that he had not. Upon objection that the statement in question, which had been admitted in evidence, did not contain an admission that he had been convicted of a felony, the court asked the appellant his age and, upon being told that he was twenty-two years old, the court stated that he was about fourteen years of age when the offense in Texas was committed and, therefore, that it was not a felony. Thereafter the deputy district attorney asked him when the trouble in Texas occurred and he stated that it was in 1930. He was then asked how old he was at the time and he said "just past fifteen." He was then asked if the statement about the trouble in Texas was true, and he replied that it was. While no questions should have been asked after the court stated that the offense in Texas could not have been a felony, no objection to these subsequent questions was made and the same facts had been brought out without objection when the statement was read. Any error which appears was not sufficiently prejudicial to justify a reversal.

The judgment and order denying a motion for a new trial are affirmed.

We concur: MARKS, J.; JENNINGS, J.

26 Cal.App.2d 183

**RUNYON v. BOARD OF PRISON TERMS
AND PAROLES et al.**

Civ. 10519.

District Court of Appeal, First District,
Division 1, California.

April 28, 1938.

1. Records $\Rightarrow$ 14

Letters and other communications and documents, voluntarily sent by individuals to state board of prison terms and paroles in connection with hearing and determination of applications for paroles, but not required by law to be sent to, or filed as official records in office board, are not open to public inspection. Pol.Code, § 1032.

2. Evidence $\Rightarrow$ 5(2)

It is matter of common knowledge that it is essential to secure all possible information bearing on applicants for parole in order to discharge impartially and intelligently functions of state board of prison terms and paroles.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding by Fred F. Runyon for a writ of mandamus to compel the Board of Prison Terms and Paroles of the State of California and others to permit plaintiff to inspect certain letters and other communications and documents sent to respondent board in connection with the hearing and determination of applications for paroles. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Vernon M. Brydolf, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for respondents.

KNIGHT, Justice.

Respondents' demurrer to appellant's petition for a writ of mandate was sustained without leave to amend, and from the judgment of dismissal entered pursuant to the order made in that behalf this appeal has been taken.

[1,2] The mandamus proceeding initiated by the filing of said petition involved the question of whether letters and other communications and documents

which are sent voluntarily by various individuals to the state board of prison terms and paroles in connection with the hearing and determination of applications for parole of prisoners in the state prisons, but which are not required by law to be sent to said board, nor to be filed as official records in the office thereof, are open to the inspection of any citizen of the state under the provisions of section 1032 of the Political Code. The trial court held they are not, and it is our conclusion that its ruling should be sustained.

The opening sentence of said code section, which is the source of appellant's claim of right of access to the letters and documents in question, provides: "The public records and other matters in the office of any officer, are at all times, during office hours, open to inspection of any citizen of this state;" and although it has been held that the use therein of the words "other matters" operates to extend, in a certain class of cases, the right of access to documents which are not required by law to be filed as public records, but which relate to matters essential to the general welfare of taxpayers, such for example as matters of taxation, revenue, and the proceedings for the carrying out of governmental projects at public expense (*Coldwell v. Board of Public Works*, 187 Cal. 510, 202 P. 879; 23 R.C.L. pp. 160, 161), the courts have consistently declared that in another class of cases public policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection, notwithstanding that they are in the custody of a public officer or board and are of a public nature (23 R.C.L. pp. 160-163). Included in this class are documents and records kept on file in public institutions, concerning the condition, care, and treatment of the inmates thereof, and the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, and punishment of criminals. 23 R.C.L. p. 161. And it would seem quite clear that the letters and documents here sought to be inspected fall within the class last mentioned because it is a matter of common knowledge that in order to impartially and intelligently discharge the functions of the state board of prison terms and paroles it is essential to secure all possible information bearing upon applicants for parole; and

necessarily much of the information thus obtained can be had only upon the understanding that the persons furnishing the same will be protected and that the information imparted will be treated as confidential.

As pointed out by respondents, the provisions of sections 1192a and 1168 of the Penal Code, as amended by St.1937, pp. 1561, 1555, relating to the fixing of sentences and the parole of prisoners, require certain official documents to be filed by and with the state board of prison terms and parols, and respondents concede that such documents are doubtless open to public inspection. But those are not the documents appellant seeks to examine. He demands the right to inspect the "numerous letters and documents" in the possession of said board which the law does not require to be submitted or filed, and which in many instances are volunteered.

Moreover, we are of the opinion that the trial court was justified in holding that the facts alleged in the petition were legally insufficient to establish such a beneficial interest on the part of petitioner as would entitle him to the issuance of the writ. Section 1086, Code Civ.Proc.; *Colnon v. Orr*, 71 Cal. 43, 11 P. 814; *Gay v. Torrance*, 145 Cal. 144, 78 P. 540; *Spotton v. Superior Court*, 177 Cal. 719, 171 P. 801.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



26 Cal.App.2d 197

PEOPLE v. WRIGHT.

Cr. 1601.

District Court of Appeal, Third District,
California.

April 29, 1938.

Hearing Denied by Supreme Court

May 26, 1938.

1. Prostitution ☞3

An information alleging that the defendant willfully, unlawfully, and feloniously procured for a named female person a place as an inmate of a house of prostitution was sufficient to charge pandering. St.1911, p. 9.

2. Prostitution ☞1

The crime of "pandering" is sufficiently established by proof of conduct of defendant which assisted, induced, persuaded, or encouraged a female to become an inmate of a house of ill fame for the purpose of practicing prostitution. St.1911, p. 9.

3. Prostitution ☞4

Evidence held to justify conviction for pandering. St.1911, p. 9.

4. Criminal law ☞531(3)

In prosecution for pandering, statement of defendant which was taken by court reporter under direction of district attorney was properly admitted, where court reporter testified that statement was voluntarily given without promise of reward or threat of punishment. St.1911, p. 9.

5. Criminal law ☞412(2), 516

In prosecution for pandering, proof of the voluntary nature of a statement of defendant which was taken by a court reporter under the direction of the district attorney was not a necessary prerequisite to the admission of the statement in evidence, where the statement consisted of a mere series of declarations regarding the circumstances of the transaction, and hence did not constitute a "confession." St.1911, p. 9.

[Ed. Note.—For other definitions of "Confess; Confession," see Words & Phrases.]

6. Prostitution ☞5

In prosecution for pandering, whether female was procured by defendant to become inmate of defendant's house of ill fame for purpose of practicing prostitution or merely to work therein as domestic servant was for jury. St.1911, p. 9.

7. Prostitution ☞1

The term "inmate" within the statute providing for the punishment of pandering means that female must become an inmate in house of ill fame for purpose of engaging in prostitution. St.1911, p. 9.

[Ed. Note.—For other definitions of "Inmate," see Words & Phrases.]

8. Criminal law ☞695(1)

In prosecution for pandering, a statement of defendant was not required to be discredited because it was taken by district attorney without first informing defendant that it might be used against her at trial and before defendant had an opportunity

to talk with her attorneys, where statement was objected to on ground that it was incompetent, irrelevant, and immaterial, and proper foundation had not been laid as to counts 2 and 4, which were dismissed. St. 1911, p. 9.

9. Criminal law §741(3)

In prosecution for pandering, determination whether admissions of defendant in her statement were true or whether contradictory evidence which she gave at trial conformed to facts with respect to controverted issues was for jury. St.1911, p. 9.

10. Criminal law §1169(1)

In prosecution for pandering, permitting the prosecutrix to testify over defendant's objection that prosecutrix was 17 years of age was not prejudicial error, since under statute it is unlawful to procure a female to become an inmate of a house of prostitution, regardless of her age. St.1911, p. 9.

11. Criminal law §1169(2) Prostitution §1

In prosecution for pandering, striking from record and instructing jury to disregard answer given by prosecuting witness on cross-examination in reply to question whether she was doing what her husband told her to do was harmless, notwithstanding that answer might have been left in record, where evidence was cumulative and other evidence showed conclusively that defendant at least encouraged and abetted prosecuting witness to become inmate of house of prostitution, since under statute, regardless of influence of husband of prosecuting witness, defendant was guilty as principal in the transaction. St.1911, p. 9.

12. Criminal law §1170(1)

In prosecution for pandering, sustaining objection to question asked prosecuting witness by defendant's attorney whether she was doing what her husband had told her to do was not reversible error, in view of evidence which conclusively showed that defendant at least encouraged and abetted prosecuting witness to become inmate of house of prostitution, and hence was guilty as principal in transaction. St.1911, p. 9.

13. Witnesses §323

In prosecution for pandering, overruling objection of defendant to an impeaching question propounded to a witness who was called by prosecution was not error, where witness was clearly adverse and unreliable. St.1911, p. 9; Code Civ.Proc. § 2049.

14. Witnesses §380(5)

A party who is taken by surprise in the testimony of a witness produced by him may be permitted to impeach the witness by proof of inconsistent statements which were made by the witness at another time and place. Code Civ.Proc. § 2049.

15. Witnesses §388(4)

In prosecution for pandering, in determining whether sufficient foundation had been laid for impeachment of witness produced by prosecution, the trial court had a right to assume that the district attorney would not have called witness if the attorney had expected her to be adverse. St. 1911, p. 9; Code Civ.Proc. § 2049.

16. Witnesses §380(5)

Where a party is surprised by unfavorable testimony given by a witness whom he has produced, the witness may be interrogated regarding previous inconsistent statements which he has made. Code Civ.Proc. § 2049.

17. Criminal law §1043(3)

The general objection that impeaching evidence is incompetent, irrelevant, and immaterial, or that it is a mere attempt to impeach one's own witness, is insufficient on which to raise for first time on appeal the failure to properly lay foundation for introduction of witness' previous inconsistent statements. Code Civ.Proc. § 2049.

18. Witnesses §380(5)

In prosecution for pandering, admitting evidence of contradictory statements previously made by witness who was called by prosecution, but who was clearly adverse, was not erroneous. St.1911, p. 9; Code Civ. Proc. § 2049.

19. Criminal law §1036(2)

In prosecution for pandering, evidence of contradictory statements previously made by witness who was called by prosecution, but who was clearly adverse, could not be objected to for first time on appeal. St. 1911, p. 9; Code Civ.Proc. § 2049.

20. Criminal law §695(2)

In prosecution for pandering, objection that proper foundation was not laid for introduction of contradictory statements previously made by adverse witness was waived by failure to specify the particular ground relied on in objecting to evidence. St.1911, p. 9.

21. Prostitution ⇨5

In prosecution for pandering, an instruction that the offense of pandering may be accomplished even though the accused person may procure a female to become an inmate of a house of prostitution by means of negotiations through a third person was not error. St.1911, p. 9.

22. Criminal law ⇨62

A person may persuade, encourage, or procure another to perform a criminal act, notwithstanding that negotiations therefor are conducted through an agent or representative.

23. Prostitution ⇨1

The statute providing for punishment of crime of "pandering" is violated by procuring a female to become an inmate of a house of ill fame to practice prostitution therein. St.1911, p. 9.

24. Prostitution ⇨5

In prosecution for pandering, instruction that "pandering" consists of unlawfully procuring female to engage in gratifying the lust of other individuals was properly given. St.1911, p. 9.

25. Criminal law ⇨1172(7)

In prosecution for pandering, defendant was not entitled to complain on appeal of the giving of an instruction that pandering consisted of unlawfully procuring a female to engage in gratifying the lust of other individuals, where jury was told that it must acquit the defendant unless she procured prosecuting witness to become inmate of house of ill fame with intention of encouraging her to practice prostitution therein, and there was evidence that defendant procured prosecuting witness to practice prostitution in defendant's house, since, if the construction thereby placed on statute was not correct, the instruction was more favorable to the defendant than she was entitled to. St.1911, p. 9.

26. Criminal law ⇨829(20)

The refusal to give two instructions offered by the defense regarding subject of aiding and abetting commission of crime was not error, where the subject was adequately covered by another instruction.

27. Criminal law ⇨829(4)

The refusal to give instructions which contained no essential element of crime which was not covered by other instructions was not prejudicial error, where court fully and fairly instructed jury on every neces-

sary element of crime, and from entire record it was apparent that verdict and judgment did not constitute miscarriage of justice.

28. Criminal law ⇨1167(4)

In prosecution for pandering, permitting the filing of a second amended information on the morning of the first day of the trial after the jury was impaneled was not prejudicial, where the amended information merely changed the language of the second and fourth counts thereof with respect to charges of conspiracy, which counts were dismissed on motion of defendant at close of prosecution's evidence, and the jury convicted the defendant only on the first count, which was not changed by the amendment in question. St.1911, p. 9; Pen.Code, § 1008.

29. Indictment and information ⇨161(3)

At any stage of the proceedings in a criminal case, the court may authorize an amendment of the information to supply any defect or insufficiency thereof, where the amendment does not result in charging an offense which was not disclosed by the evidence adduced at the preliminary examination, and the substantial rights of the defendant are not thereby prejudiced. Pen. Code, § 1008.

30. Criminal law ⇨1044, 1119(2)

In prosecution for pandering, submission of the case to the jury after two conspiracy counts of the indictment had been dismissed, without striking from record all the evidence regarding conspiracy, was not prejudicial error, where the defendant failed to move to strike out such evidence or to direct the court's attention to prejudicial evidence, and trial court instructed jury to disregard evidence of conspiracy, and especially where no prejudicial evidence was pointed out on appeal, but all challenged evidence to which attention of reviewing court was directed appeared to be competent. St.1911, p. 9.

31. Criminal law ⇨814(2)

In prosecution for pandering, wherein charges of conspiracy were dismissed at close of prosecution's case, the refusal to give an instruction regarding the alleged absence of evidence with respect to conspiracy was not error. St.1911, p. 9.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Louise Wright was convicted of pandering, and she appeals.

Affirmed.

Prior opinion, 78 P.2d 260.

Lawrence Edwards and Charles H. Epperson, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

A rehearing was granted in this case for the purpose of modifying the statement of fact contained in the original opinion, of which the appellant complains. After again reviewing the record we are convinced the original opinion correctly declares the law applicable to the facts of this case. With certain modifications the original opinion is therefore adopted as follows:

The defendant was convicted under the first count of an information charging her with pandering, contrary to the provisions of the statutes. Stats. 1911, p. 9, 1 Deering's Gen.Laws of 1931, p. 819, Act 1906. The information alleges that the defendant did "wilfully, unlawfully and feloniously procure for a female person, to-wit: one Esther Stephens Blanas, a place as an inmate of a house of prostitution."

The appellant contends that the verdict and judgment of commitment are not supported by the evidence; that the court erred in receiving and rejecting testimony, and in giving to the jury and refusing certain instructions. It is also inferred the first count of the information upon which the defendant was convicted fails to state facts sufficient to constitute a public offense.

[1,2] The information states a good cause of action for the crime of pandering. People v. Cimar, 127 Cal.App. 9, 15 P.2d 166, 16 P.2d 139. It alleges that the defendant procured Esther Blanas to become an inmate of a house of prostitution. Under the statute above referred to, pandering may be accomplished in several different ways. It is said in the Cimar Case, supra, (page 167) that: "If the conduct of the defendant assisted, induced, persuaded, or encouraged the female to become an inmate of the house of ill fame for the purpose of practicing prostitution, the crime of pandering is sufficiently established." The first count of the information

is couched in the language of the statute and states a good cause of action.

[3-5] The judgment and verdict are adequately supported by the evidence. We have carefully read the entire transcript of evidence, and find that every necessary element constituting the crime of pandering as alleged in the information is sufficiently supported by competent evidence. A statement of the defendant, which was taken by the court reporter under the direction of the district attorney, was properly received in evidence. The court reporter testified that it was voluntarily given without promise of reward or threat of punishment. Proof of the voluntary nature of the statement was not a necessary prerequisite to its admission in evidence, since it does not constitute a confession of the defendant, but rather consists of a mere series of declarations regarding the circumstances of the transaction. 8 Cal.Jur. 98, §§ 194, 195. The defendant admitted that she operated a house of prostitution at No. 130 West Lafayette street in Stockton, to which Esther Blanas was taken as an inmate; that the defendant accompanied Gus Blanas to Sacramento in his automobile June 28th, to procure a girl for her house of prostitution; that she was then introduced to Esther, who was called "Sunny," and at the request of Gus she consented to that girl becoming an inmate of her house of ill fame. Two weeks later Gus Blanas took Esther to Reno where she said they were married. The defendant's statement with relation to her participation in procuring Esther to become an inmate of her house, reads in part:

"Q. What sort of a business do you conduct at that address? A. Prostitution.

"Q. Are you, yourself, actually engaged in that business? A. Well, I have been; I haven't lately. * * *

"Q. During the past month what part did you play in the management at that place of business? A. I was there by myself.

"Q. You were working yourself? A. Yes.

"Q. Did you employ any other girls to work for you in the last month? A. In June, you mean? A. Yes. A. Well, yes, for about a week and a half, something like that, the latter part of June. * * *

"Q. Why did you go to Sacramento with Gus Blanas? A. I went over there

to see if I could find somebody to come over to the house to work. * * *

"Q. Did you have any conversation with either the girl [Esther] or Gus Blanas with respect to the prospect of her working for you at a future date? A. I did with Gus. * * * He asked me if it would be all right if he brought a girl to the house to work. I said, I guess it would be if she was of age. * * *

"Q. You received money earned by this girl 'Sunny' in acts of prostitution at that place of yours at 130 West Lafayette Street each night as such money was turned over to you by your step-mother, Mabel? A. Yes."

Regarding the defendant's knowledge that Esther became an inmate of her house of ill fame with her consent, it appears that Gus Blanas, in company with Irene, another prospective inmate of the house, and Mabel Massmedsu, went with Esther to the house where the defendant roomed to obtain her approval of placing Esther in the house of prostitution. The defendant stated in that regard:

"Q. For what purpose did they come there? A. To bring the girls there. I guess to tell me that they were going to work. * * *

"Q. They wanted you to see if she looked like a proper girl to be there? A. Yes. * * *

"Q. Gus's arrangements were made between himself and you, not with Mabel, isn't that correct, isn't that the reason they all came to your house? A. In one way, yes, but in another way, no. He had talked to Mabel first about it and Mabel asked me about it."

The defendant testified she had given Mabel Massmedsu, her stepmother, full authority to manage and operate her house of prostitution. When Esther was first brought from Sacramento to Stockton to become an inmate of the house, she was taken to Mabel for approval. Esther testified in that regard:

"Q. You had no conversation with her? A. No, but later I,—later my husband told me that that introduction was to see if I would do."

Then, Esther was taken with the group to the defendant for her personal approval, as the above-quoted evidence clearly indicates. Esther testified that they met the defendant, who was called "Teena"; that she did not personally talk with her, but that

the defendant did say to her associate, Irene, that it would be all right for them to become inmates of the house. Esther testified in that regard: "She [the defendant] answered Irene—Irene's question if it would be all right for us to work, and she said it was all right."

Regarding the instructions which were given to Esther the following question was propounded to the defendant: "Who taught this girl 'Sunny,' Mrs. Gus Blanas, the ways of the craft?" To this inquiry, the defendant replied: "I guess she [Mabel] did. One night I happened to be up there and she had been told before."

The record contains conflicting testimony, but the foregoing evidence, with the reasonable inferences which may be drawn therefrom, warranted the jury in finding the defendant guilty of procuring the girl, Esther, to become an inmate of her house of ill fame for prostitution purposes.

It is true that the defendant talked with Gus Blanas and with her stepmother, Mabel Massmedsu, who was actively managing the business, regarding the admission of the girl to her house. It may be true that the plan of persuading Esther to become an inmate of the house originated with Gus Blanas, and that it was approved by Mabel, but it was the defendant's business. She actively participated in procuring the girl to become an inmate of her house of ill fame. She took from her one-half of all the money she earned from practicing prostitution. There is no doubt the defendant procured Esther to become an inmate of her house of ill fame for the purpose of profiting from her practice of prostitution therein. Certainly the defendant "encouraged" the girl to become an inmate of her house and to practice prostitution there.

[6] There is no merit in the appellant's inference that the evidence merely shows that Esther was induced to become an inmate of the house "to work" therein as a domestic servant, only. It is true that the defendant went to Sacramento to meet the girl to determine whether she would be suitable "to work" in the house of prostitution. The evidence is undisputed that she practiced prostitution therein. There is no evidence that she ever performed any other kind of work in that house. Reading the statement of the defendant which was received in evidence, one is impressed with the fact that the only purpose on the part of the defendant in inducing the girl to enter the house was to profit from her prac-

tice of prostitution at that place. At least that is a reasonable inference to be drawn from the evidence. It was the sole province of the jury to determine from all of the evidence adduced at the trial whether Esther was procured by the defendant to become an inmate of her house of ill fame for the purpose of practicing prostitution or merely to work there as a domestic servant. Indeed, in spite of the fact that Mabel, the manager of the house, testified she did not know that Esther practiced prostitution in the house, and that the defendant very carefully insisted that she went with Gus to Sacramento to get a girl "to work for her," the appellant's counsel on petition for rehearing conceded that Esther was taken into the house to practice prostitution. They do, however, insist that the defendant did not assist in procuring her for that purpose. These were questions for the determination of the jury. With their conclusion in that regard we may not interfere since it is supported by substantial evidence.

[7] The court correctly instructed the jury that the gist of the crime prohibited by the statute in question was to prevent pandering, and that the term "inmate," as it is used in the statute, means that the female must become an inmate in the house for the purpose of engaging in prostitution. It follows that the verdict of guilty, which was returned by the jury, necessarily implies that it determined that the defendant procured the girl to become an inmate of her house for the purpose of inducing her to practice prostitution therein, and not to work there as a mere domestic servant.

[8] It is contended the statement of the defendant, which was received in evidence, should be discredited because it was taken by the district attorney without first informing her that it might be used against her at the trial, and before she had an opportunity to talk with her attorneys. It is true that at the trial she contradicted many incriminating admissions which were contained in the statement. The record shows that the statement was made in the presence of District Attorney Cloudsley and Detective Sergeant Parker. The court reporter, who took the statement in shorthand, and transcribed it into typewriting, testified that it was taken with "no promises or threats; it was a free and voluntary statement." There is no evidence to the contrary. When it was offered in evidence, the objection thereto was limited to its application to counts 2 and 4 of the information, both

of which were subsequently dismissed. Mr. Edwards, attorney for the defendant, said in that regard: "Object to it as to Counts Two and Four. * * * It is incompetent, irrelevant and immaterial, not a proper foundation laid against those counts." The objection was specifically limited to the application of the statement to counts 2 and 4, which were dismissed. The statement was voluntary and competent. The objection was properly overruled.

[9] It was the sole province of the jury to determine whether the admissions of the defendant in her statement were true, or whether the contradictory evidence which she gave at the trial conformed to the facts with respect to controverted issues. Her statement supports the conclusion that she personally participated in procuring Esther to become an inmate of her house of ill fame for prostitution purposes.

[10] It was not prejudicial error to have permitted the prosecutrix to testify over the objection of the defendant that she was seventeen years of age. It is immaterial what the age of a female is in order to constitute the crime of procuring her to become an inmate of a house of prostitution. Under the statute it is unlawful to procure a female to become an inmate of such a house, regardless of her age. The evidence shows that the defendant said it would be all right to take her into that house "if she was of age." It also shows that Mabel informed the defendant Esther told her she was twenty-two years of age. The evidence of her age is harmless. The ruling in that regard is not reversible error.

[11] It was not error for the court to strike certain evidence from the record and to instruct the jury to disregard an answer given by the prosecuting witness in reply to a leading and suggestive question propounded on cross-examination by the defense, as follows:

"As a matter of fact * * * you were doing just what Gus told you [to do] * * * ? A. Yes."

This question and answer might properly have been left in the record as tending to show whether the defendant procured or encouraged her to become an inmate of the house. But the evidence was cumulative, and, under the statute, even if she did enter the house in accordance with her husband's desire, the evidence conclusively shows that the defendant at least encouraged and abetted her action in that respect.

Regardless of the influence of her husband, the defendant was still guilty as a principal in the transaction. The ruling was harmless. It was not reversible error.

[12] For the same reason it was not reversible error for the court to have subsequently sustained an objection to a similar question propounded to the same witness by the attorney for the defendant.

[13,14] It was not error for the court to overrule an objection of the defendant to an impeaching question propounded to an adverse witness, Mabel Massmedsu, who was called by the prosecution. The witness was clearly adverse and unreliable. In overruling the objection the court said: "Apparently he [the district attorney] is surprised at her testimony." It is a principle too well established to require citations, that a party who is taken by surprise in the testimony of a witness produced by him may be permitted to impeach the witness by proof of inconsistent statements which were made by him at another time and place. Section 2049, Code Civ.Proc.

[15] There is no merit in the appellant's contention that the foundation for her impeachment was not first laid. The very character of her testimony clearly shows that she was adverse to the prosecution. In spite of the fact that the defendant asserted that Mabel was the manager in control of her house, Mabel testified that she acted as a mere chambermaid, and that she did not know Esther practiced prostitution there. The court had a right to assume the district attorney would not have called her as a witness if he had expected her to so testify. The trial judge clearly saw from her conduct on the stand and from her manner of testifying that she was an adverse witness and that the prosecution had been taken by surprise in her testimony. Moreover, the objection to that impeaching evidence failed to assign the lack of proof of a foundation therefor. All that was said by Mr. Edwards was: "I will object on the ground that obviously it is an attempt to impeach his own witness."

[16,17] The rule is well established that when a party is surprised by unfavorable testimony given by a witness whom he has produced, he may be interrogated regarding previous inconsistent statements which he has made. Section 2049, Code Civ.Proc.; *People v. Crawford*, 24 Cal.App. 396, 404, 141 P. 824; 74 A.L.R. 1042, note. The general objection that impeaching evi-

dence is incompetent, irrelevant, and immaterial, or that it is a mere attempt to impeach his own witness, is insufficient upon which to raise, for the first time on appeal, the failure to properly lay the foundation for the introduction of that evidence. *People v. Watts*, 198 Cal. 776, 791, 247 P. 884; *People v. Cotton*, 117 Cal.App. 469, 4 P.2d 247; 8 Cal.Jur. 504, § 518; 2 Cal.Jur. 273, § 86; 3 Am.Jur., p. 94, §§ 346, 347.

[18-20] The ruling admitting evidence of contradictory statements previously made by an adverse witness was neither erroneous nor can it be raised for the first time on appeal. That objection was waived by failure to specify the particular ground relied upon.

[21,22] It was not error to instruct the jury that the offense of pandering may be accomplished even though the accused person may procure the female to become an inmate of a house of prostitution by means of negotiations therefor through a third person. *People v. Torres*, 193 Cal. 730, 227 P. 177. This instruction was properly given. One may persuade, encourage, or procure another to perform a criminal act, even though the negotiations therefor are conducted through an agent or representative. While the evidence shows that the defendant personally went to Sacramento to see Esther and consented to her becoming an inmate in her house of ill fame it also shows that defendant talked about the subject with Gus Blanas and with her manager of the business, Mabel Massmedsu. It may reasonably be said her negotiations to admit the girl to her house were partly conducted through those individuals, but that fact rendered the defendant none the less guilty as a principal in the crime.

[23-25] The jury was instructed that "pandering consists of unlawfully procuring a female to engage in gratifying the lust of other individuals." The jury was then told it must acquit the defendant unless it appeared that she procured Esther Blanas to become an inmate of her house of ill fame with the intention of encouraging and enticing her to practice prostitution therein. Assuming that the statute is violated only by procuring a female to become an inmate of a house of ill fame to practice prostitution therein, which we believe is the spirit of the law, the challenged instruction was properly given to the jury. If that is not the correct construction of the statute, then the instruction was more favorable to the

defendant than she was entitled to have given, and she may therefore not complain of that fact. The jury was plainly told that the defendant could not be convicted unless it appeared that she had procured the girl to become an inmate of her house of ill fame with the intention of inducing or encouraging her to practice prostitution therein. There is no doubt that the girl did practice prostitution in that house; and that the defendant appropriated one-half of the money the girl earned in that manner. There is therefore evidence that she procured her for that purpose.

[26] It did not constitute error for the court to refuse to give two instructions offered by the defense regarding the subject of aiding and abetting the commission of a crime. That subject was adequately covered by another instruction which was given to the jury.

[27] Nor was it prejudicial error to refuse to give the other instructions offered by the defense, which refusal is complained of. They contain no essential element of the crime which is not covered by other instructions which were given in the court's charge. The court very fully and fairly instructed the jury on every necessary element of the crime with which the defendant was charged. Moreover, from a careful reading of the entire record it is apparent that the verdict and judgment which were rendered in this case do not constitute a miscarriage of justice. On the merits of the case, without doubt, the defendant was properly convicted.

[28, 29] The defendant was not prejudiced by the filing of a second amended information on the morning of the first day of trial, after the jury was impaneled, which merely changed the language of the second and fourth counts thereof, with respect to separate charges of conspiracy to commit the offense of pandering. By leave of court the second amended information was filed after the jury had been impaneled and before any evidence was adduced. It does not appear the defendant objected to filing that amended pleading. The amended information did not change the language of the first count, which is the only charge of which she was convicted. At the close of the prosecution's evidence, upon motion of the defendant, the second and fourth counts of the information, which were the only ones changed in any manner by the challenged amendment, were dismissed. In its charge to the jury, the court specifi-

cally directed it as follows: "You are instructed that the court has dismissed counts 2 and 4 of the information on file against the defendant charging conspiracy to commit the crime of pandering, and you are, therefore, to disregard and give no consideration to said counts 2 and 4 charging conspiracy to commit the crime of pandering."

The jury acquitted the defendant of count 3 of the information. She was convicted of count 1, only. That count was not changed by the amendment in question. The defendant was therefore not prejudiced by the amendment. At any stage of the proceedings in a criminal case the court may authorize an amendment of an information to be filed to supply any defect or insufficiency thereof, which does not result in charging an offense which is not disclosed by the evidence adduced at the preliminary examination, and when the substantial rights of the defendant are not thereby prejudiced. Section 1008, Pen. Code; 14 Cal.Jur. 91, §§ 68, 69; *People v. Milligan*, 77 Cal.App. 745, 247 P. 580. In the case last cited an amendment of the information was filed by leave of court, over the objection of the defendant, after the evidence was completely closed. We are unable to perceive how the defendant could possibly be prejudiced by the amendment which was filed, under the circumstances of this case.

[30] It is contended that it constitutes prejudicial error for the court to have permitted the case to go to the jury after the two counts of the indictment with respect to the charges of conspiracy had been dismissed, without striking from the record all the evidence regarding conspiracy. That procedure was not erroneous or prejudicial. There was no motion on the part of the defendant to strike out any such evidence. The court was directed to no such alleged prejudicial evidence. We are not now pointed to any evidence in the record which appears to be incompetent or prejudicial. All of the challenged evidence to which our attention is now directed appears to be competent as tending to show the intent and purpose of the defendant to have procured Esther Blanas to become an inmate of her house of ill fame for the purpose of unlawfully practicing prostitution therein. If there are circumstances which do not tend to prove those essential facts they are trivial and harmless. Moreover, the court by clear

inference instructed the jury, as we have previously stated, that it should not consider such evidence of conspiracy, and, on the contrary, that it should disregard entirely the charges of conspiracy.

[31] For the reasons heretofore assigned it was not error for the court to refuse to give to the jury the instruction regarding the alleged absence of evidence with respect to conspiracy.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



26 Cal.App.2d 256

GEORGE v. WESTON.

Civ. 2207.

District Court of Appeal, Fourth District,
California.

May 5, 1938.

Hearing Denied by Supreme Court
July 1, 1938.

1. Pleading ⚡8(7)

In action to obtain specific performance of agreement to execute oil and gas lease, allegation that agreement for lease was in all respects fair, equitable, and just was a mere conclusion, and, in absence of facts relied on to warrant it, was insufficient to show that proposed lease would be fair to defendant.

2. Pleading ⚡32

A complaint, in action for specific performance of agreement to execute oil and gas lease, alleging that agreement was fair and equitable, but failing to set out lease other than to refer to form number, was insufficient to state cause of action, since it was impossible to determine from complaint whether proposed lease would be fair or unfair to defendant or whether agreement sued on possessed element of mutuality.

3. Pleading ⚡32

In action for specific performance of agreement to execute oil and gas lease, complaint referring to form number of lease, but failing to set out terms thereof or to show that such form would supply all of elements necessary to give agreement cer-

tainty, was defective because of uncertainty.

4. Pleading ⚡243

Where it could not be determined from inspection of original complaint, in action for specific performance of agreement to execute oil and gas lease, that plaintiff would be unable to amend it so as to state cause of action and eliminate uncertainty, trial court should have allowed plaintiff to amend instead of entering judgment for defendant.

5. Pleading ⚡245(1)

The plaintiff in specific performance action was not required to amend his complaint in advance of ruling on demurrer thereto.

6. Specific performance ⚡32(3)

Where oil and gas lease gave lessee permission to surrender lease or any part of leased land at any time, lease lacked mutuality and plaintiff was not entitled to specific performance of agreement to execute lease. Civ.Code, § 3386.

7. Specific performance ⚡6

An oil and gas lease running not only to plaintiff but to his heirs and assigns did not thereby require personal services of any particular individual, and plaintiff was not barred from obtaining specific enforcement of agreement to execute lease on ground of lack of mutuality in that it undertook to obligate him to perform personal services which could not be decreed.

8. Specific performance ⚡75

Specific performance of agreement to execute an oil and gas lease could not be avoided on ground that performance sought was that of a succession of different acts, since it was of single act of executing lease in agreed form.

9. Appeal and error ⚡1040(2)

That trial court improperly entered judgment on demurrer for defendant without affording plaintiff opportunity to amend complaint did not require reversal, where filing of amended complaint could do plaintiff no good because of insufficiency thereof.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by James P. George against F. F. Weston to obtain specific performance of an agreement to lease for oil and gas.

From a judgment for defendant, and from an order refusing to vacate the judgment and refusing to permit the plaintiff to file an amended complaint, the plaintiff filed two separate appeals.

Judgment and order affirmed.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellant.

W. B. Beazley, of Bakersfield, and Arthur W. Bolton, of San Francisco, for respondent.

HAINES, Justice pro tem.

This action is prosecuted on the part of the plaintiff and appellant to obtain specific performance of what is described as "Agreement to Lease for Oil and Gas." The instrument involved is unilateral in form, being signed by the defendant but not the plaintiff and, except for the property described and an attached notarial acknowledgment, is in words and figures following:

"Agreement to Lease for Oil and Gas.

"I, the undersigned, for and in consideration of \$100.00 to me in hand paid, receipt whereof is hereby acknowledged, do give and grant unto James P. George, his heirs or assigns, for a period of 30 days from and after the date hereof, the sole and exclusive right of leasing for the purpose of operating for oil and gas the lands particularly described as follows, to-wit: (Here follows a description by government subdivisions of land in Kern county, claimed in appellant's brief to amount to 1040 acres.)

"Upon demand by the said James P. George, or his heirs or assigns, within the time above specified, I agree to execute an oil and gas lease upon the form known as the 'Oil Publishing Form No. 86-C' and deliver same to Bakersfield Abstract Co., at Bakersfield, California, to be held as an escrow with instructions to deliver said lease to the assigns of James P. George upon payment of the sum of \$940.00, said lease to remain in escrow a sufficient length of time to permit the said Title Company to render a report showing the conditions of the title to said property.

"Said lease to provide for drilling operations to be commenced within half year from date of lease, but lessee may extend time for commencing drilling operations for an additional period of five years by paying to the lessor the sum of \$1.00 per acre per year in advance, drilling to a

depth of ——— feet, one well to each twenty acres, one sixth royalty to lessor, lessee to pay five-sixth of increase of taxes. I warrant said lands to be free and clear of all encumbrances except usual country rights of way.

"In witness whereof, I have hereunto set my hand this 21st day of August, 1936. (Signed) F. F. Weston. Witness: (Signed) R. B. Ellis."

The original complaint alleges the execution and delivery by defendant to plaintiff of this writing, and request by plaintiff to defendant to execute to him an oil lease in the form therein contemplated, but states that on September 10, 1936, the defendant repudiated the agreement and gave plaintiff notice that he would not carry it out, and asserts that the plaintiff is able, ready, and willing to perform its terms on his part and has so advised the defendant. It is further alleged that "said agreement for lease is in all respects fair, equitable and just," that the defendant has filed a document in the recorder's office of Kern county "constituting a cloud upon the title of said agreement"; that it "is necessary that the title of plaintiff with respect to said document and said agreement to lease said real property be quieted * * *"; that the plaintiff has no plain, speedy, or adequate remedy at law, and that it is impossible to fix the damages from the breach of the agreement and that only by specific performance can plaintiff have full relief. A decree is sought, requiring the defendant to carry out the agreement "by executing to the plaintiff herein an oil lease in accordance with the terms of said agreement" and "that title under said lease to said real property be quieted * * *."

To this complaint a demurrer was sustained without leave to amend and judgment entered in defendant's favor accordingly. Thereafter the plaintiff moved the court to vacate the judgment and permit him to file an amended complaint. The proposed amended complaint was intended to eliminate any defects in the original pleading and, to that end, it set out by way of an exhibit what is stated to be the form 86-C of lease referred to as to be executed by the defendant. This document is too long to be here reproduced and we shall content ourselves with referring to certain of its provisions. It purports to bear date August 27, 1936. It is stated to be "for and in consideration of the sum of 1040

Dollars lawful money of the United States of America to the Lessor paid and for other valuable considerations, * * * and in consideration of the covenants and agreements hereinafter contained by the Lessee to be kept and performed." It grants to the lessee, its grantees, successors, and assigns (the lessee, though a natural person being referred to as "it") the exclusive right to drill for and produce "oil and gas, asphaltum and other hydrocarbons" on the land referred to, stated to contain 1,040 acres, more or less, "for a term of twenty (20) years from and after the date hereof, and so long thereafter as oil or gas or casinghead gas or other hydrocarbon substances or either of them is produced therefrom." The lessee is to pay as royalty to the lessor one-sixth of the proceeds of the oil produced, after making certain specified adjustments, and of the gas produced and saved. The above-mentioned considerations are to include all rental for the first six months of the term but thereafter the lessee is annually to pay or tender to the lessor "in advance as rental" \$1 per acre "for so much of said land as may then still be held under this lease until drilling operations are commenced or this lease terminated as herein provided." The lessee "agrees to commence drilling operations within 5½ years from the date hereof * * * and to prosecute the same with reasonable diligence until oil or gas is found in paying quantities, or to a depth at which further drilling would in the judgment of the Lessee be unprofitable; or it may at any time within said period terminate this lease and surrender said land as hereinafter provided." The lessee "may elect not to commence or prosecute the drilling of a well on said land as above provided and thereupon this lease shall terminate." If the lessee does drill on the land and the first well fails to produce oil or gas in paying quantities then such lessee is, within six months from the completion or abandonment of the first well, to commence drilling another. "Lessee may at any time quitclaim this lease in its entirety, or as to part of the acreage covered thereby, with the privilege of retaining twenty (20) acres surrounding each producing or drilling well, and thereupon Lessee shall be released from all further obligations and duties as to the area so quitclaimed and all rentals and drilling requirements shall be reduced pro rata."

In addition to setting out as an exhibit this form of lease, the proposed amended complaint amplifies the allegations of the original pleading in various particulars. Thus it is, *inter alia*, stated that the royalty of one-sixth of the proceeds of the exploitation is in excess of the usual proportion which is stated to be one-eighth; that generally the terms of the proposed lease are usual, standard, and customary in California and known to be such to defendant; that the document complained of as having been filed by defendant with the recorder of Kern county and to be a cloud on plaintiff's title consists of a written repudiation by the defendant of the agreement, which must be cleared up to make the plaintiff's right to receive the lease merchantable.

The court refused to vacate its judgment and denied the plaintiff's application to file this amended complaint.

[1-3] Thereupon, the plaintiff filed two separate appeals, one from the judgment and the other from the order refusing to vacate the judgment and refusing to permit the amendment. Both appeals are presented upon the same briefs and are here for determination. The complaint as originally filed does not set out any lease. It sets out only the agreement to execute a lease "for the purpose of operating for oil and gas" certain described lands, and asks a decree requiring the specific performance of that. The agreement, as already seen, is, upon the demand of the plaintiff or his heirs or assigns, within the specified time, "to execute an oil and gas lease on the form known as Oil Publishing Form, No. 86-C." It does not appear from this pleading what are the contents of that form nor, except for the meager statement contained in the document which is set out and which we have hereinbefore quoted, does it appear what the defendant as signer of that document intended that the lease should contain. It is indeed urged that that is certain which can be made certain. But the original complaint does not allege that the said "form No. 86-C" is one in general use in the trade, but even if it did the court could hardly take judicial notice of its provisions or requirements. There is, therefore, in the complaint, as originally presented, nothing from which the court could reasonably conclude either that the proposed lease would be fair or unfair to the defendant and although the complaint

does assert that the "agreement for lease is in all respects fair, equitable and just" it is settled that this assertion is but a conclusion and that the facts relied on to warrant it must be set out. *Agard v. Valencia*, 39 Cal. 292, 302; *White v. Sage*, 149 Cal. 613, 616, 87 P. 193; *Herzog v. Atchison, Topeka & Santa Fe Railway Co.*, 153 Cal. 496, 500, 501, 95 P. 898, 17 L.R.A., N.S., 428; *Smiley v. Read*, 163 Cal. 644, 648, 126 P. 486; *Joyce v. Tomasini*, 168 Cal. 234, 237, 142 P. 67; *Magee v. Magee*, 174 Cal. 276, 281, 162 P. 1023; *Salisbury v. Yawger*, 184 Cal. 783, 795, 195 P. 682; *Martin v. Condrey*, 13 Cal.App. 618, 620, 110 P. 457; *Porter v. Anderson*, 14 Cal.App. 716, 721, 113 P. 345; *Andersen v. Charles*, 52 Cal.App. 290, 198 P. 641; *Rittigstein v. Dignan*, 122 Cal.App. 357, 359, 9 P.2d 856. By the same token, in consequence of the failure of the original complaint to set out said form 86-C, it could not be ascertained therefrom whether the agreement sued on possessed or did not possess the element of mutuality essential to the right to require its specific performance. For both of the reasons given we think that there was no cause of action originally stated. In various particulars, moreover, the specifications of uncertainty contained in the demurrer appear to us to have been well founded. Since the agreement pleaded referred to another writing, that is form No. 86-C, the agreement itself cannot be said to have been necessarily uncertain. For aught that appeared in it, that writing (form No. 86-C) might have supplied all of the elements necessary to give it certainty. In failing, however, to show that such was the fact, the complaint as originally filed was undoubtedly uncertain. The demurrer was properly sustained.

[4, 5] We think, however, that the trial court fell into error in entering judgment for the defendant without affording the plaintiff opportunity to amend. It appears that counsel for plaintiff were not present when the demurrer was sustained, but had submitted the matter on a memorandum of authorities. From an inspection of the original complaint it could not be determined that the plaintiff would be unable to so amend it as to state a cause of action and eliminate the uncertainty complained of. The plaintiff was not required to apply to amend his complaint in advance of the ruling on the demurrer. *Schaake v. Eagle, etc., Can Co.*, 135 Cal. 472, 480, 63

P. 1025, 67 P. 759. The trial court should, therefore, have allowed an amendment.

[6] Manifestly, the propriety of the court's further action, however, in refusing to vacate the judgment or to permit the filing of the amended complaint depends on the sufficiency of the case stated in this latter pleading. Its sufficiency to support any decree for specific performance is attacked on various grounds. It is said that the proposed lease, as now disclosed, would lack the mutuality required by section 3386, Civil Code, which reads as follows: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

Respondent's counsel argue that there is such want of mutuality because appellant cannot be compelled specifically to perform, in that "he can surrender the lease at will and is not obligated to perform any act and because any performance by him involves the drilling of oil wells which require the performance of personal service and successive acts."

In support of the claim that the permission to surrender the lease or any part of the leased land at any time is enough to destroy the element of mutuality the cases principally relied on are *Sturgis v. Galindo*, 59 Cal. 28, 43 Am.Rep. 239, *Dabney v. Key*, 57 Cal.App. 762, 207 P. 921, and *Sheehan v. Vedder*, 108 Cal.App. 419, 292 P. 175. *Sturgis v. Galindo* involved a contract whereby the owner of land agreed to sell the same to two other parties who were experienced prospectors. The latter were, as part of the purchase price, to prospect for coal and if it were found, to organize a corporation to exploit it in which the vendor was to have a certain block of stock. By the terms of the contract the vendees if, before the time fixed for its performance, they became satisfied that it was useless to further prospect there for coal, were entitled to abandon the arrangement. The vendees did not in fact perform their covenants at all but undertook to assign an interest in the contract to third parties who sued the vendor for specific performance. The court held that the suit must fail for want of mutuality, both

because of the conditional right given to the vendees to abandon the property and also for the reason that it contemplated the rendition by the vendees of personal services involving the use of their own skill as prospectors which there would have been difficulty in compelling them to render, even if they had not disabled themselves from doing so by their attempted conveyance of interests to others. In *Dabney v. Key*, supra, following the authority of *Sturgis v. Galindo*, it is held in terms that a contract to make a lease of land for the purpose of developing oil wells thereon is not specifically enforceable when the proposed lease reserves to the lessees the right to surrender it at such time as the lessees see fit, but purports to bind the lessors for a term of years. In *Sheehan v. Vedder*, supra, in which this court affirmed a judgment of the same trial court from which the present appeal is taken, an oil drilling contract contained a clause to the effect that (page 176): "The party of the second part at any time before or after the discovery of oil on said premises may quitclaim said property or any part thereof to the parties of the first part, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall * * * cease and determine as to the premises quitclaimed."

This court, relying on *Sturgis v. Galindo*, supra, and *Dabney v. Key*, supra, held that the lessee's right to abandon robbed the contract of mutuality and made it impossible to require its specific performance and that, in these circumstances, it afforded no defense to an action to quiet title brought by the lessors. A somewhat similar situation was considered and a like view taken of the matter by this court in *Moore v. Heron*, 108 Cal.App. 705, 710, 292 P. 136.

It is the claim of appellant's counsel that so far as the destruction of mutuality by a right reserved to the lessee to surrender the lease is concerned the four cases last mentioned have been overruled by the Supreme Court in *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871, and *Standard Oil Company v. J. P. Mills Organization*, 3 Cal.2d 128, 43 P.2d 797. We are unable to find in these decisions anything that lends even color to that view. The facts in brief in *Callahan v. Martin* were that the land involved had been owned by one Gonzales who had executed an oil lease thereon wherein certain royalties

were reserved. While this lease was in effect Gonzales and wife executed a conveyance purporting to be in perpetuity to the defendants Martin of "three per cent. (3%) landowner's royalty, being three per cent. (3%) of all oil, gas and other hydrocarbon substances and/or minerals produced, extracted and saved on the following described property" (followed by its description). The lessees under the oil lease, after Gonzales and wife had made this conveyance to the Martins, threw up their lease and quitclaimed all their rights under it to Gonzales from whom, by subsequent mesne conveyances, the plaintiff Callahan obtained such title as Gonzales still had to convey. Callahan, as owner in fee, then sued the Martins to quiet title, apparently on the theory that their rights were terminated with the termination of the lease. A judgment in his favor was reversed. The Supreme Court, in discussing the oil lease, after reviewing certain authorities, used the following language (page 794) especially relied on for appellant here: "That the lessee has a vested estate in the land prior to production of oil, and although the lease contains provisions for forfeiture upon failure to discover oil, or for breach of covenants of the lease, and although the rights granted are in consideration of rent and royalty to accrue, rather than upon a cash consideration paid in advance, is established by the above-cited cases. See note, 3 A.L.R. 378, as to effect of surrender clauses. Under an ordinary lease of surface rights, with provision for rentals to accrue, a leasehold estate vests in the lessee, although the lease contains provision for forfeiture upon conditions subsequent."

To point out the inapplicability of this language to the instant situation it is only necessary to observe that there is no analogy at all between a lease that is perfectly valid in itself but subject to conditions subsequent that may at some future time bring it to an end and an instrument that so far lacks mutuality that it can be terminated at any time by the lessee under it. What the court was really concerned with in *Callahan v. Martin* was not primarily the leasehold there incidentally mentioned, but the circumstance that Gonzales as owner of the fee had, with his wife, granted to the Martins a right, not, like the present form of lease, for a mere term, but in perpetuity, to a share in the oils, gases, and other hydrocarbons to be extracted from the land.

What was chiefly under discussion was the sort of an estate conveyed to the Martins and it was held to amount to an incorporeal hereditament in the nature of a servitude in gross upon the land and as such to be real property. The court, *inter alia*, said (page 793): "That rights in and to land, though they are embraced within the definition of an incorporeal hereditament, constitute a limited interest or estate in land, is generally recognized. * * * Where this limited interest is to endure in perpetuity or for life, it is a freehold interest, and real property or real estate, as well as an estate in real property. But, where it is for years, although an interest in land or in real estate, it is not real estate, but a chattel real, in like manner as a lease for years."

It is manifest that this discussion has no application to the case at bar. In our view, the discussion in *Standard Oil Company v. Mills Organization*, *supra*, is equally remote from anything here involved.

[7,8] Respondents, as has been seen, also claim that the proposed lease undertakes to obligate appellant to perform personal services and, since this performance cannot be decreed, that it, in that respect also, lacks mutuality, citing, *inter alia*, *Los Angeles, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528, 78 P. 25. In this contention respondent is on less solid ground. In *Los Angeles, etc., Co. v. Occidental Oil Co.* mutuality was, indeed, held to be, for this reason, absent, but there the personal services to be rendered by one Martin, including his obligation personally to see to organizing a proposed corporation for the contemplated exploitation, as well as to see that various rights were gotten together and vested in it, were involved. In the instant case the agreement runs not only to plaintiff but to his heirs and assigns so that it is clear that there is no question of a requirement of the personal services of any particular individual. Neither do we think the respondent right in claiming that the specific performance sought is of a succession of different acts. It is of one act—the act of executing a lease in the agreed form.

However, for the reasons hereinbefore given, the arrangement as now set out in the proposed amended complaint and the exhibit thereto must be held to lack the mutuality necessary to warrant a decree for its specific enforcement. In these circumstances it seems to us unnecessary to

discuss respondent's further claims that the consideration does not appear from the amended complaint to be adequate or just and reasonable within the meaning of section 3391, Civil Code, or that there are still such uncertainties in the proposed lease as ought to render it unenforceable.

[9] Since the filing of the amended complaint could do appellant no good it would be futile to reverse the judgment or the order refusing to vacate it and be futile to permit the amended complaint to be filed.

The judgment and order appealed from are, therefore, both affirmed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 241

FIDELITY & DEPOSIT CO. OF MARYLAND v. STEPHENSON et al.

Civ. 6048.

District Court of Appeal, Third District,
California.

May 4, 1938.

Licenses ☞26

In equitable suit by surety on \$5,000 bond of stockbroker which became bankrupt, to ascertain and pay relative proportions to which three claimants were entitled for losses on account of derelictions of broker in sum of \$12,000, \$1,600 and \$250, the pro rata sum to which each claimant was entitled was the proportion of \$5,000 which each claim bore to \$13,500 which was aggregate amount of claims, as against contention that distribution of shares in amount of bond should be based on relative sums recoverable under bond and not the pro rata share thereof determined by relative proportion of their aggregate losses. St.1917, p. 673, as amended; St.1933, p. 2315, § 6.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Suit by the Fidelity & Deposit Company of Maryland against Harriet B. Steph-

enson and others to ascertain and pay the relative proportions of a bond of a stock broker on which plaintiff was surety, wherein Emma L. Leuzinger and George W. Wild and another filed cross-complaints. From a judgment, Emma L. Leuzinger appeals.

Affirmed.

E. O. Leake, J. J. Leake, and Potter & Potter, all of Los Angeles, for appellant.

Leon K. Jonas, Joe Crider, Jr., and A. F. Mack, Jr., all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, Emma L. Leuzinger, has appealed from a judgment which was rendered in an equitable suit brought by the plaintiff as surety on the bond of a stockbroker, to ascertain and pay the relative proportions of the bond to which several claimants are entitled on account of losses sustained by them as a result of derelictions of the broker.

This action was instituted to prevent a multiplicity of suits. It is based upon detriment accruing to the several defendants in separate transactions which they had with A. J. Merrick & Co., a corporation, conducting a stock brokerage business in the state of California, by means of which the firm fraudulently obtained and appropriated to its own use the sums of money hereafter mentioned. In compliance with the Corporate Securities Act of California, St.1933, p. 2315, § 6, A. J. Merrick & Co. furnished and filed its bond on qualifying in the sum of \$5,000 to secure the faithful performance of its acts as a stock broker. The bond was executed by the respondent, Fidelity & Deposit Company of Maryland. The bond provides that the principal, A. J. Merrick & Co., and its agents, shall fully comply with the Corporate Securities Act of California, St.1917, p. 673, as amended, and shall "honestly and faithfully apply all funds received, and faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities by said broker, his agents and employees." The bond also contains the following provisions:

"That any person who sustains an injury covered by this bond may, in addition to any other remedy that he may have, bring an action in his own name

upon this bond for the recovery of any damages sustained by him. * * *

"That the total aggregate liability of the surety or sureties herein shall be limited to the payment of Five Thousand Dollars (\$5,000.00)."

The complaint alleges that three other separate suits against the stockbroker and the surety company were commenced in the courts in Los Angeles for separate specified amounts, by the defendants named herein; that the aggregate detriment claimed by the plaintiffs in those three actions on account of the broker's derelictions amounted to the sum of \$13,850, which was in excess of the \$5,000 limitation of liability under the bond; that the defendants in this suit be required to establish the validity of their respective claims herein, and that they be restrained from attempting to collect from the surety company, in their respective suits, more than their just pro rata shares of the amount of the indemnity bond; that the court ascertain and determine the losses sustained by each of said claimants and prorate to each his share of the amount of said surety bond to which he is entitled. The complaint prays that after the payment of said sums the surety may be exonerated from further liability on account of its said bond. Demurrers to the complaint were overruled. The defendant, Emma L. Leuzinger, filed an answer and cross-complaint in this cause, asserting her claim for \$1,600. The defendants, George W. and Kate S. Wild, husband and wife, filed their separate answer and cross-complaint for a claim of \$12,000. The defendant, Harriet B. Stephenson, who had previously prosecuted her claim for \$250 to judgment in the municipal court of Los Angeles county, did not appear in this case. But it was stipulated between all parties hereto that her said claim "shall be paid out of the aforesaid penal sum of said bond pro rata with other judgment creditors thereon." The delinquent stock brokerage company had been declared bankrupt, and it was not made a party to this suit.

This cause was tried by the court, which adopted findings to the effect that the three separate claimants sustained losses on account of the derelictions of the stockbroker in the following amounts: George W. and Kate S. Wild, the sum of \$12,000; Emma L. Leuzinger, the sum of \$1,600; and Harriet B. Stephenson, the sum of

\$250; that the limit of liability of the surety company on its bond is the aggregate sum of \$5,000; that the pro rata sum to which each claimant is entitled under the provisions of the bond is the proportion of said \$5,000 which the claim of each bears to the total sum of \$13,850, which is the aggregate amount of the three claims; that upon that basis George W. and Kate S. Wild are entitled to the sum of \$4,332; Emma L. Leuzinger is entitled to \$577.50; and Harriet B. Stephenson is entitled to \$90.50. Judgment was accordingly rendered against the respondent, Fidelity & Deposit Company of Maryland, and in favor of each of the said claimants for the respective sums last mentioned, together with interest and costs of suit. From that judgment the defendant and cross-complainant, Emma L. Leuzinger, has appealed. The appeal is presented to this court on a certified copy of the pleadings and proceedings without the evidence which was adduced at the trial. It is a mere appeal from the judgment roll.

The only point raised by the appellant is the quota or pro rata share of the amount of the indemnity bond of \$5,000 which was allowed to her. The appellant contends that the court erred in allowing her only the sum of \$577.50; that each of the separate suits for detriment for the derelictions of the stockbroker, as against the surety, is based solely on the provisions of the bond; that this action is founded on contract and does not sound in tort; that since each separate claimant was entitled to recover from the surety the full amount of his loss if it does not exceed the amount of the bond, it follows that Stephenson was entitled to judgment for \$250, the appellant was entitled to \$1,600, and George W. and Kate S. Wild were entitled to a judgment for only the maximum sum provided by the bond, namely, \$5,000, and that the respective claimants, therefore, were entitled to participate in the available fund in the proportions which the last-mentioned three sums bear to their aggregate amount of \$6,850 instead of the total sum of their three claims which is \$13,850. In other words, it is asserted the distribution of shares in the amount of the bond should be based on the relative sums recoverable under the bond and not the pro rata share thereof determined by the relative proportion of their aggregate losses on account of the torts of the stockbroker. In support of her con-

tention the appellant relies on *Betzer v. Olney*, 14 Cal.App.2d 53, 57 P.2d 1376; *Kane v. Mendenhall*, 5 Cal.2d 749, 56 P.2d 498, and *Wiggins v. Pacific Indemnity Co.*, 134 Cal.App. 328, 25 P.2d 898.

We are of the opinion there is no merit in the foregoing contention of the appellant. This is a suit in equity to ascertain and distribute the just proportions of an acknowledged fund to the claimants pro rata according to the respective losses sustained on account of the torts of the broker with whom they dealt. The losses sustained are the measure of damages of each claimant. The very purpose of this action was to avoid a multiplicity of suits and to ascertain and equitably distribute the available bond fund among those who are entitled to share therein. The proportions and extent to which each is entitled to participate in that fund, subject to the maximum liability prescribed by the bond, is measured by the proportionate loss sustained by each on account of the derelictions of the broker. The total losses sustained by the three claimants is \$13,850. In a suit for tort against the broker they would be entitled to recover judgment for the full amount of \$12,000. Under the terms of the contract of bond, they are entitled to participate on the same proportionate ratio with other claimants. The limitation of liability expressed in the bond is not the measure of the proportion thereof to which a claimant is entitled. It would be inequitable and unjust to require Mr. and Mrs. Wild to forfeit \$7,000 of their just claim before they are entitled to participate on an equal basis with other claimants. We are of the opinion there is no merit in the contention of the appellant in that regard.

The foregoing authorities which are cited by the appellant do not support her contention that one of several claimants, whose losses exceed the maximum liability under a bond, must forfeit all in excess of that maximum figure before he may participate with the others in prorating the fund. That would be an unjust and inequitable rule. In none of them was that principle involved or declared. In none of them was there a single claimant who sustained a loss in excess of the maximum liability of the bonds involved. It is determined that no claimant may recover judgment against a surety bond in excess of the maximum liability thereof. That does not mean that in ascertaining

the proportions of a surety bond to which several claimants may be entitled, those whose claims exceed the maximum amount of the liability must forfeit the sum in excess thereof in participating with the others. Judgment was not rendered against the surety company for the full amount of the loss of Mr. and Mrs. Wild. The claims of the several parties merely furnished the basis upon which the available fund was prorated among them. The judgment which was rendered against the surety company in favor of Mr. and Mrs. Wild was for only the sum of \$4,332. We are of the opinion the fund was properly prorated.

Kane v. Mendenhall, *supra*, declares no rule of apportionment of a surety fund which supports the appellant's contention in this case. In that action the American Surety Company furnished Mendenhall a \$2,000 bond on qualifying as a real estate agent under the provisions of the California Real Estate Act, St.1919, p. 1252, as amended. For dereliction of his duties, Kane brought a suit for damages against the real estate agent and his surety, jointly. Judgment for \$4,500 was rendered against the agent, and a judgment of only \$2,000 was entered against the surety company, because of its limitation of liability prescribed by the bond. The court said (page 500): "A cause of action in tort against the broker to recover full damages existed independently of the provisions of the Real Estate Brokers' Act or the existence of a bond."

In that suit no other claimant was involved in an effort to participate in the \$2,000 bond fund. That case merely determines that a claimant may recover upon the contractual liability of the bond. It does properly state that recovery may not be had on the bond for more than the maximum liability thereof. But it does not determine that a claim in excess of the maximum liability expressed may not be prorated with other claims in determining what proportion of the fund each is entitled to receive.

In the case of Wiggins v. Pacific Indemnity Co., *supra*, a real estate broker furnished two separate \$2,000 bonds on qualifying pursuant to the provisions of section 9a of the California Real Estate Act. The broker was guilty of derelictions of his duties. The plaintiff, Wiggins, brought suit against both bonds for \$2,150. Three other claim-

ants interpleaded. Benn had a claim of \$250, Bollmann had a claim for \$1,264.50, and Cunningham claimed a loss of \$1,635.-31. The four claims aggregated the sum of \$5,299.81. The maximum liability was \$4,000. The surety company filed a cross-complaint alleging that without previous knowledge of these claims, it had already satisfied two judgments for other similar claims aggregating the sum of \$2,748.60, and that according to the terms of the bonds its liability was limited to \$4,000, leaving only the sum of \$1,251.40 available from which to satisfy the remaining claims. The court rendered judgment against the surety company for the full amount of the four claims aggregating the sum of \$5,299.81. On appeal it was determined that the limitation of liability was \$4,000; that the surety company had already paid out \$2,748.60 of that amount and retained only the sum of \$1,251.40, which sum it ordered distributed among the respective claimants in proportion to their ascertained interests therein.

That case involved no one claim in excess of the \$4,000 limitation of liability. The court seems to have indicated that the four claimants should participate in the remaining fund in the proportion which their respective claims bore to the aggregate unpaid indebtedness. That case is not authority for the principle of apportionment announced by the appellant.

Nor is the case of Betzer v. Olney, *supra*, in conflict with what we have said. In that case a \$5,000 bond was furnished by a real estate broker. He was also guilty of derelictions. Three individuals joined in a suit against the bond. None of their claims exceeded the \$5,000 limitation of liability, although the three claims aggregated nearly \$8,000. The court found the several amounts in which the claimants were damaged, and prorated them so as not to exceed the \$5,000 limitation of liability. On appeal it was determined that two of the claimants, in whose favor judgment had been rendered, merely loaned money to the broker, and that their claims did not come within the provisions of the Corporate Securities Act, which claims were secured by the surety bond. The appellate court held that the trial court erroneously rendered judgment against the surety for those two claims. The court said (page 1380): "With the claims of the respondents Betzer and Olney elimi-

nated, the respondent Dorrance was entitled to recover the full amount of his loss, as found by the court."

There were but three claimants in that case. The loss sustained by Dorrance, who was the only remaining claimant entitled to be reimbursed from the bond fund, was found by the court to be the sum of \$2,812.50. The appellate court therefore properly held that since the other two parties were not entitled to participate in the bond fund, Dorrance was entitled to the full amount of his claim. There is nothing in that case contrary to what we have previously said with respect to the proper rule for prorating a surety fund under the circumstances of this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



26 Cal.App.2d 223

PEOPLE v. SIMPSON et al.

Cr. 1616.

District Court of Appeal, Third District,
California.

May 3, 1938.

Hearing Denied by Supreme Court
June 2, 1938.

1. Criminal law ☞1169(1)
Larceny ☞46

In prosecution for theft of twelve magnetos taken from tractors, admission of evidence of cost of reinstalling magnetos was erroneous, and, where evidence was presented to jury as basis for determining market value of magnetos, was prejudicial.

2. Larceny ☞72

In prosecution for theft of twelve magnetos taken from tractors, refusal of instruction that jury should disregard testimony admitted relative to cost of reinstalling magnetos, since only test of grand or petty theft was that set forth in statute stating that reasonable and fair market value should be test, was error. Pen.Code, § 484, as amended by St.1935, p. 2194.

3. Larceny ☞46

In determining whether theft of magnetos was a felony or only a misdemeanor,

market value thereof was thing to be considered by jury and not also cost of reinstalling them on tractors from which they were taken. Pen.Code, § 484, as amended by St.1935, p. 2194.

4. Larceny ☞65

Where testimony concerning cost of reinstalling twelve secondhand stolen magnetos had been improperly admitted in prosecution for theft thereof, instruction advising jury not to consider that testimony had been refused and witnesses testifying concerning value of magnetos had testified from outward appearance of magnetos without introduction of any testimony concerning their mechanical condition, jury had no substantial basis for fixing value of property, and improperly found defendants guilty of a felony.

5. Criminal law ☞1184

Where jury improperly fixed degree of theft as grand theft instead of petty theft, Court of Appeal reduced degree of offense and fixed it as petty theft to avoid necessity of new trial.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Willard Simpson and Sidney Simpson were found guilty of stealing 12 magnetos of the alleged value of \$300, and they appeal.

Judgment modified so as to find defendants guilty only of petty theft, and cause remanded, with directions.

Prior opinion, 78 P.2d 438.

John R. Cronin, of Stockton, for appellants.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and F. C. Cloudsley, Dist. Atty., and Maxwell M. Willens, Deputy Dist. Atty., both of Stockton, for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

A rehearing was granted in this cause in order that the testimony might be more fully analyzed, and also in order that we might reconsider the effect upon the verdict resulting from the admission of improper testimony, and the refusal to give an instruction to the jury which would have corrected the error in the admission of testimony.

The defendants were tried and found guilty of stealing and carrying away twelve magnetos of the alleged value of \$300, lawful money of the United States, the personal property of the California Tractor & Equipment Company. The jury found that the defendants were guilty of a felony, in that the value of the property was over the sum of \$200. Upon this appeal the value of the property is seriously contended, it being urged that its value is simply shown to be problematical, by reason of the fact that no real examination was made by any of the witnesses as to the mechanical condition of the magnetos.

The magnetos in question were all taken from secondhand, or what is more commonly called "used tractors." Just how old the tractors involved are or were is not shown by the testimony, nor is there any testimony showing or indicating the use to which any of the tractors had been subjected. Some of them were in the possession of the Equipment Company for over a year. The entire number of tractors from which the magnetos were taken had been purchased by the Equipment Company as used tractors.

The testimony of all of the witnesses, whether for the prosecution or for the defense, rested upon simply an inspection of the outward appearance of the magnetos, and not upon an examination of their mechanical condition.

The first witness who testified as to the value of the magnetos was Mr. Rohn, the owner and proprietor of the Equipment Company. The questions and answers indicate that the witness was not really giving the market value of the different magnetos. The questions and answers in relation thereto are as follows:

"Q. Now, Mr. Rohn, what was the market value of the magnetos taken from your place of business on November 24, 1937, in San Joaquin County? A. Why, the value of the magnetos was from \$25. to \$35. apiece."

His testimony is further to the effect that the magnetos came with the tractors, and it shows that he had neither bought nor sold magnetos, nor did he pretend to give the age of the magnetos, or how long they had been in use; they simply came with the used tractors as a part of the equipment.

The next witness called by the prosecution was I. G. Boice. This witness testified that he had a shop of his own in Stockton;

that he occasionally handled magnetos, that is, that he made repairs upon magnetos; that he had handled magnetos at different times for approximately ten years. This witness testified that he was familiar with the market price of magnetos on tractors; that they repaired magnetos; were not in the business of selling magnetos, but did sell a magneto occasionally. His testimony was to the effect that the magnetos ranged anywhere from \$25 to \$35 apiece. The following questions and answers indicate that the witness was simply giving an estimate:

"Q. Five of them at \$30.00? A. Between \$30.00 and \$35.00; it is pretty hard to estimate the value.

"Q. Yes; and the value is about \$35.00? A. Two at \$35.00; that is only approximately.

"Q. That is your best judgment as to the market value? A. That is my opinion; a close-up magneto it is hard to judge."

On cross-examination the witness further testified:

"Q. Mr. Boice, you say it was approximately? A. Approximately.

"Q. In order to get the real test you would practically have to take them apart and see how the points were? A. That is approximate, judging that the magnetos are in working condition.

"Q. In working condition? A. In working condition."

Further questions and answers related to what would be necessary in repairing used magnetos.

A witness by the name of Cooper, called by the prosecution, stated that he worked for the Auto Electric Company; that the Electric Company both sell and service magnetos; that he was familiar with the market value of magnetos on Thanksgiving Day, 1937. This witness testified that the market value of magnetos was from \$20 to \$35 apiece. On cross-examination he testified as follows:

"Q. Mr. Cooper, are you a mechanic? A. No, not at present.

"Q. Do you know anything as to the condition of these magnetos from their outward appearance? A. No, that is impossible.

"Q. Isn't it a fact that in order to tell the value of a magneto you would have to open it and take it apart and see how the points and coils are? A. Yes, you would to get a real accurate estimate of it.

"Q. Your estimate is not a real accurate estimate of it, but an approximation, isn't that right? A. Considering the magnetos are in working condition?

"Q. Yes. You don't know anything definitely as to the value particularly of any one of these magnetos, do you? A. The actual value? No, I may not."

A witness by the name of Grissel, called by the prosecution, testified that he was the proprietor of the Cletrac Tractor Company; that he had been in the tractor business about nineteen years; that he was familiar with the values of magnetos. This witness estimated the value of the magnetos as around \$35 to \$40 apiece. The testimony does not disclose as to whether he was basing his estimate of values upon market value or upon the specific magnetos in question. On cross-examination he further testified that he could not tell from looking at the magnetos whether they were in practical working condition or not, and that he did not know whether they were or were not in working condition. As to actual value, the witness testified that it would be necessary to open and examine magnetos. Nothing appears in this witness' testimony as to whether he did or did not take into consideration the use to which the magnetos had been subjected, and how long they had been a part of the equipment of the used tractors from which they were taken.

A witness by the name of Guyman, called by the prosecution, testified that he had been repairing magnetos off and on for some ten years; that he was familiar with the market value of magnetos. He further stated, on used magnetos he would not be able to give an approximate value without knowing their condition. If they were on operating equipment, and running, he would put the value in the neighborhood of \$30 or \$40 apiece.

One of the witnesses called by the prosecution testified that the value was more or less of a guess, was more or less of a gamble.

A witness by the name of Stockwell, called by the defense, testified that he was familiar with the market value of magnetos; that he was in charge of the electrical equipment of the Acme Auto Wrecking Company; that he was repairing and dealing in magnetos; that the value of the magnetos in question would run from \$15 to \$17.50 each; that the market value of the Bosch magnetos would be about \$17.50

each. This witness testified that he had bought and sold magnetos, but his answer as to the price which he paid for them was stricken out. The witness further testified that the Bosch magnetos would sell for about \$17.50 each.

A witness by the name of Weaver, called for the defense, testified that he is an automotive electrician; that he worked for the Auto Electrical Supply Company; that he was familiar with the market value of magnetos; that they were worth from \$10 to \$17.50 apiece, depending upon the manufacture; that no one could tell the actual value of a magneto without taking it apart and inspecting its mechanical condition; that frequently the cost of repairing a magneto was greater than the value of the magneto itself; that his company had on hand some seventy-five or eighty magnetos which were adapted for use on tractors and automobiles. This witness appears to be the only one who testified to having on hand a stock of magnetos, and the market value thereof. This witness testified that the fair market value of the Boschs would be from \$15 to \$20 apiece; the American magnetos would be of the market value of about \$12.50 apiece.

A witness by the name of Newmaster, on behalf of the defense, testified that he was familiar with the market value of magnetos, and fixed the price on used ones; that he had had to do with magnetos for eight years. This witness testified that the values ranged from \$12.50 to \$17.50 apiece.

A witness by the name of Sweney, called by the defense, testified that he had been in the electrical repair business about twenty-one years; that he had been repairing magnetos for about fifteen years; was familiar with the market value of magnetos; and that the values of the magnetos in question would run from \$10 to \$17.50 each; some of them might be worth \$20 each.

As we have said, the testimony absolutely fails to disclose the mechanical condition of the magnetos; that the values placed thereon are simply estimates, based upon the outward appearance, and not upon actual knowledge. We think one of the witnesses accurately stated the situation when he said, the question of value was a guess, or a gamble.

[1] Over the objection of the defendants, the prosecution was permitted to introduce evidence that it would cost \$7.50 to replace the magnetos upon the tractors

from which they were taken, aggregating the sum of \$90. In argument to the jury the prosecution contended that this \$90 might be taken into consideration in determining the market value of the magnetos. The admission of this testimony was clearly erroneous, and, as presented to the jury as a basis for determining the market value of the magnetos, is certainly prejudicial.

[2, 3] Section 484 of the Penal Code, as amended by St.1935, p. 2194 relating to market value, reads as follows: "In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test."

The defendants requested of the court the following instruction: "Testimony has been admitted herein over the objection of defendants relative to the cost of reinstalling the magnetos in question, on the tractors or other equipment on which they were originally placed. You are instructed that you are to disregard said testimony, as the only test of grand or petty theft herein is confined in that portion of section 484 of the Penal Code, reading as follows: 'In determining the value of the property obtained, for the purpose of this section, the reasonable and fair market value shall be the test.'"

The giving of this instruction was refused. In view of the testimony relative to the cost of reinstalling the magnetos, admitted over the objection of the defendants, the requested instruction should have been given in order that the jury might not take into consideration the cost of reinstalling any of the magnetos. It is not a question of what an owner would have to pay for reinstalling a magneto; it is the market value thereof which is to be considered by the jury in determining whether the offense is a felony or only a misdemeanor.

In the case of *People v. Gilbert*, 163 Mich. 511, 128 N.W. 756, Ann.Cas.1912A, 894, appears a very clear statement of the rule relative to values (page 757): "The rule is well settled that the special value to the owner of property stolen is not the proper basis for proving its value. If the articles have a market value at the time and place of larceny, that is the true basis. 1 McClain, Crim.Law, par. 585. 'By value

is meant, not what the thing is worth to the owner, but the price that it would bring in open market.' 18 Am. & Eng. Ency., 2d Ed., 467, citing *State v. Doepke*, 68 Mo. 208, 30 Am.Rep. 785. There was evidence of the market value of this property."

[4] In view of the admission of testimony as to the cost of reinstalling the magnetos which should have been excluded, the refusal of the court to give the requested instruction advising the jury not to consider such testimony in fixing values, and, further, in view of the fact that secondhand magnetos were involved in this action, with no testimony introduced as to their mechanical condition or how long they had been used, or the kind of uses to which they had been subjected, and the fact that the different witnesses were only testifying from the outward appearance of the magnetos and giving approximate values, we think it clearly appears that the jury had no substantial basis upon which to fix the value of the property, or find the defendants guilty of a felony. This, however, does not lead to a reversal of the case, or the sending of it back for retrial and adding additional costs to the county.

The defendants admitted the taking of the magnetos, and thereby admitted that they were guilty of petty theft. The jury has found the defendants guilty of stealing, but we think improperly fixed the degree as grand theft instead of petty theft.

[5] Under the decision of the Supreme Court in the case of *People v. Kelley*, 208 Cal. 387, 281 P. 609, and likewise in *People v. Ciani*, 104 Cal.App. 596, 286 P. 459, we are authorized to reduce the degree of the offense and fix the same only as petty theft, and thus avoid the necessity of a retrial.

Following the procedure of the two cases just referred to, the verdict is modified and the judgment is modified so as to find the defendants guilty only of petty theft, and the cause is remanded to the trial court with directions to enter judgment against the defendants, finding them, and both of them, guilty of petty theft, and to thereupon pronounce judgment upon them, and each of them, as prescribed by law.

We concur: PULLEN, P. J.; THOMPSON, J.

26 Cal.App.2d 172

**STANDARD ELEMENTARY SCHOOL
DIST. OF KERN COUNTY v. HEALY,
County Superintendent, et al.**

Civ. 1876.

District Court of Appeal, Fourth District,
California.

April 27, 1938.

1. Schools and school districts ⇨144(1)

A grant of a leave of absence to teacher for one year to be accompanied by payment of compensation must clearly appear to have been asked for and granted for express purpose of study and travel for benefit of school and pupils as provided by statute. School Code, § 5.722, as added by St. 1931, p. 1598.

2. Schools and school districts ⇨144(1)

The statute providing for granting of leave of absence to teachers for travel and study for benefit of schools and pupils of district, and payment of compensation to teacher during leave of absence if so specified by written agreement would not be presumed to be applicable to leave granted teacher in absence of showing that leave was granted for purpose of travel or study, or that written agreement providing for payment of compensation was entered into between board of trustees and teacher. School Code, § 5.722, as added by St. 1931, p. 1598.

3. Schools and school districts ⇨144(1)

The provision of the School Code for payment of compensation to teacher during absence from duty because of illness relates to absence from duty for which no leave of absence has been obtained. School Code, § 5.750, as added by St. 1931, p. 856.

4. Schools and school districts ⇨144(1)

The claim of a teacher for the difference between amount of her salary and amount paid substitute while teacher was on a voluntary leave of absence could not be supported under statute relating to payment of compensation during absence from duty because of illness, since statute is inapplicable to absence for which leave has been obtained. School Code, § 5.750, as added by St. 1931, p. 856.

5. Schools and school districts ⇨133

The provision of the School Code authorizing governing boards of school districts to grant leaves of absence to persons

employed in positions requiring certification qualifications confers on governing boards of school districts general power to grant leaves of absence and broad discretion with respect thereto. School Code, § 5.720, as amended by St. 1933, p. 2187.

6. Schools and school districts ⇨133

The action taken by board of trustees of school district granting teacher's application for leave of absence for her own convenience without written agreement for payment of compensation during leave was properly taken under statutory power of governing board of district to grant leave of absence. School Code, § 5.720, as amended by St. 1933, p. 2187.

7. Schools and school districts ⇨145

The provisions of the School Code permitting appeal by teacher whose salary is withheld, to superintendent of public instruction whose judgment shall be final, relate exclusively to subject of "salary" and do not refer to leaves of absence, since term "salary" by definition precludes possibility that any salary could be due in such situation or that refusal to pay compensation during period covered by leave would constitute a "withholding of salary" within such provisions. School Code, §§ 5.760, 5.761.

"Salary" is synonymous with word "wages," meaning a reward or recompense or sum of money periodically paid for services rendered, regardless of manner in which value of services is ascertained; the rendition of some sort of service being a necessary element of the definition.

[Ed. Note.—For other definitions of "Salary" and "Wages," see Words & Phrases.]

8. Injunction ⇨118(3)

In action to enjoin county superintendent of schools from issuing requisition for teacher's claim for compensation while on leave of absence, amended complaint alleging that claim had been allowed by superintendent of public instruction, and that county superintendent would, unless restrained, issue requisition for amount thereof, was not demurrable for failure to state cause of action as against contention that under statute allowance of claim by superintendent of public instruction was final and act of county superintendent in issuing requisition therefor was performance of

mere statutory duty and hence not enjoinder. School Code, §§ 5.720, as amended by St.1933, p. 2187; §§ 5.760, 5.761.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Standard Elementary School District of Kern County, California, against Herbert L. Healy, as County Superintendent of Schools, and another, to enjoin County Superintendent from issuing requisition in payment of teacher's claim. From a judgment dismissing the action, the plaintiff appeals.

Reversed, with directions.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Brittan & Mack, of Bakersfield, for respondents.

JENNINGS, Justice.

The appeal herein has been taken by the plaintiff from a judgment dismissing the action after a demurrer interposed by defendants to the first amended complaint had been sustained without leave to amend. The question here presented, therefore, involves a consideration of the allegations contained in the first amended complaint for the purpose of determining whether or not it may properly be declared that the pleading fails to state facts which are sufficient to constitute a cause of action.

The pertinent and material facts which are stated in the first amended complaint are as follows: The plaintiff is an elementary school district of Kern county organized under the laws of the state of California. Defendant Healy is the duly elected, qualified, and acting superintendent of schools of Kern county. The defendant Katherine Aslin was employed as a teacher by the board of trustees of the plaintiff district for the school year 1934-35 at a salary of \$180 per month. On May 24, 1935, said teacher voluntarily, intentionally, and for her own convenience presented to the board of trustees of plaintiff district a request in writing that she be granted a leave of absence for the school year 1935-36. Such request was in the following language:

"Having received notice of employment for the year 1935-1936, I wish to ask for a leave of absence from my work for one year.

"If this leave is granted to me, it is with the understanding that in September, 1936,

I may return to my work without my tenure having been in any way affected, and with my salary equaling that of the teachers who are now on the same salary schedule as I."

Thereafter the board of trustees granted the request for leave of absence and the said defendant served no part of the school year covered by the leave of absence. Because of the fact that said defendant performed no service during the school year the board of trustees employed another teacher at a salary of \$155 per month. In May, 1936, the defendant Katherine Aslin made a claim upon the plaintiff school district for the sum of \$75, which claim was rejected by the board of trustees on May 22, 1936. On June 17, 1936, Katherine Aslin filed a purported appeal of her claim and its rejection with the superintendent of public instruction of the state of California. On August 13, 1936, the last-mentioned official purported to decide that defendant Katherine Aslin was entitled to payment of her claim for \$75 and notified defendant Healy of his decision. The board of trustees of plaintiff district has refused and continues to refuse to pay said claim and defendant Healy, as superintendent of schools of Kern county, has informed plaintiff that he will issue his requisition in favor of defendant Katherine Aslin for the sum of \$75 in payment of said claim and plaintiff believes that unless restrained he will do so. Plaintiff is not withholding any salary whatsoever from the defendant school teacher and the purported appeal to the state superintendent of public instruction was improper and his purported decision thereon was void and the payment of said claim would amount to an unlawful expenditure of public moneys. For this reason defendant Healy has no right, authority, or jurisdiction to issue a requisition in payment of the claim. The pleading concludes with a prayer that it be decreed that the defendant Aslin has no claim for compensation against plaintiff, that defendant Healy be ordered not to pay the sum of \$75 or any other sum to defendant Aslin, and that defendant Healy be restrained and enjoined from paying the said claim.

It will be noted that the above-described allegations contain no suggestion of the basis for the claim which the teacher made upon the school district. However, in the statement of facts which is contained in plaintiff's opening brief, it is stated that the amount of the claim represented the difference between the salary which Katherine Aslin received during the school year of

1934-35 and the amount which was paid to the teacher who was employed to substitute for her during the school year of 1935-36, when she was absent on leave. It is immediately apparent that the sum of \$75 did not constitute the full amount of such difference since the salary paid to Katherine Aslin was \$180 per month, whereas the substitute received \$155 per month. This discrepancy is explained in the brief filed by defendants by the statement that Katherine Aslin voluntarily limited her demand to the sum specified in her claim. Since it is thus agreed by all parties to this appeal that the amount for which the claim was made represented the difference in the amount of salary paid to the two teachers and that the presentation of the claim was based on the contention of the defendant Aslin that she was entitled to receive such difference, no point will here be made of the fact that the amended complaint contains no showing of the basis for making the claim and, for the purposes of this opinion, it will be assumed that the pleading shows on its face that the claim was made for the reason indicated.

The defendants contended in support of the demurrer filed by them to the complaint and they here contend in support of the judgment which was rendered upon the sustaining of their demurrer without leave to amend that the pleading fails to state a cause of action for the issuance of an injunction. The basis for this contention is found in the provisions of section 5.760 and section 5.761 of the California School Code. The former section is entitled "Right of Appeal. Investigation" and provides as follows: "Any teacher whose salary is withheld may appeal to the superintendent of public instruction, who shall thereupon require the superintendent of schools to investigate the matter and present the facts thereof to him."

The latter is entitled "Judgment and its Enforcement" and contains the following language: "The judgment of the superintendent of public instruction shall be final; and upon receiving it the superintendent of schools, if the judgment is in favor of the teacher, shall, in case the trustees refuse to issue an order for said withheld salary, issue his requisition in favor of said teacher."

It is argued that since the pleading shows on its face that the defendant teacher upon the denial of her claim by the board of trustees of the plaintiff school district appealed

to the state superintendent of instruction, who rendered judgment in favor of the teacher, and since section 5.761 of the School Code provides that such judgment shall be final and on receipt thereof the superintendent of schools shall, in case of refusal by the trustees to issue an order for payment of the salary withheld, issue his requisition in favor of the teacher, it is apparent that no cause of action for injunctive relief against the defendant superintendent of schools is stated for the reason that he is only proposing to perform the duty which is clearly imposed upon him by the last-mentioned statute.

The correctness of the contention thus advanced depends on the determination of whether or not the claim made by the defendant Katherine Aslin is the kind of claim contemplated by section 5.760 of the School Code as to which it is declared by the immediately following section of said Code that the judgment of the superintendent of public instruction shall be final.

As heretofore noted, it is agreed that the claim which forms the basis of the present controversy was made because the claimant contended she was entitled to receive the difference between the amount of salary which had been paid to her during the school year of 1934-35 and the amount which was paid to the teacher employed to substitute for her during the following school year when she was absent on leave. Her contention in this regard is in turn based on the provisions of section 5.722 of the School Code, as added by St. 1931, p. 1598. This section provides that the governing board of any school district shall have the power to grant any employee of the district who is employed in a position requiring certification qualifications a leave of absence for not to exceed one year "for the purpose of permitting study or travel by said employee which will benefit the schools and pupils of the district." It is further provided in the third paragraph of this section that "every employee granted a leave of absence under the provisions of this section may be required to perform such services and may receive such compensation during such leave as the governing board of the district, with the approval of the county superintendent of schools, and the employee may agree upon in writing, but such compensation shall be the difference between the salary of the employee on leave and the salary of a sub-

stitute teacher in the position which the employee held prior to the granting of such leave." It is argued that the amended complaint shows on its face that the leave of absence which was granted to the defendant Katherine Aslin was granted pursuant to this section and that as a consequence she became entitled to receive the difference in salary which is specified in that portion of the section last quoted. It is observed that the amended complaint alleges that Katherine Aslin "voluntarily, intentionally, and for her own convenience" requested the leave of absence granted to her, but it is said that the quoted verbiage is a pure statement of conclusions by the pleader and, in any event, that a request for leave for purposes of travel or study would be voluntary, intentional, and for the convenience of the applicant. It is said that the only facts pleaded in the complaint which have any bearing on the intention of the teacher in applying for the leave of absence are the statements contained in the letter which she addressed to the board of trustees. It is further observed that the letter contains no suggestion of the reason for which leave was requested and no allegation is set out in the pleading indicating that the trustees had any knowledge of the reason for which the leave was granted. It is therefore urged that it is possible to conclude that leave was asked for the purpose of travel or study and since no facts are alleged which negative a request for such purpose it is declared that it must be assumed that the leave was asked and granted for such purpose.

[1,2] The argument thus advanced is specious but not impressive. The allegation in the pleading that application for leave was made for the convenience of the applicant negatives the idea that it was made for the purpose of travel or study pursuant to section 5.722 of the School Code, as added by St.1931, p. 1598, since the language of the section states that the study or travel for which leave may be granted is limited to study or travel "which will benefit the schools and pupils of the district." A leave for such purpose so qualified may hardly be said to be a leave asked solely for the convenience of the applicant. Furthermore, it must be conceded that a leave of absence for so long a period is an unusual privilege and if the grant of such leave is to be accompanied by payment of compensa-

tion during the period covered by the leave it must clearly appear that the leave was asked and granted for the express purpose stated in the statute. Not only is this true, but the section further provides that if compensation is to be paid during the teacher's absence it must be so specified by written agreement entered into between the governing board of the district with the approval of the county superintendent of schools and the employee. Inasmuch as plaintiff's complaint is barren of any allegations which indicate that the teacher's application for leave was made or granted for purpose of travel or study and further contains no showing that a written agreement providing for payment of compensation was entered into between the board of trustees and the teacher, the contention of defendants that it must be presumed that section 5.722 of the School Code, as added in 1931, is applicable cannot be sustained.

It is also suggested that section 5.750 of the School Code, as added by St.1931, p. 856, may be applicable to the situation described in plaintiff's amended complaint. The portion of this section upon which defendants particularly rely is as follows: "When a person employed in a position requiring certification qualifications is absent from his duties on account of illness for a period of five school months or less, the amount deducted from the salary due him for any month or months in which such absence occurs shall not exceed the sum which shall actually have been paid a substitute employee employed to fill his position during his absence. When a person employed in a position requiring certification qualifications is absent from his duties on account of illness for a period of more than five school months, or when a person is absent from his duties for a cause other than illness, the amount deducted from the salary due him for the month or months in which such absence occurs shall be determined according to the rules and regulations established by the governing board of the district." It is argued that this section of the Code recognizes the authority of the governing boards of school districts to establish regulations for determining the compensation to be paid to a teacher who is absent from his duties for a period longer than five months either by reason of illness or for some cause other than illness, that it will be admitted that the plaintiff had established no such regulations, that the general

law established in the School Code is therefore applicable to the situation, and that the third paragraph of section 5.722, as added by St.1931, p. 1598, to which reference has heretofore been made and which provides that the compensation shall consist of the difference between the salary paid to the teacher during the preceding school year and the salary paid to a substitute, furnishes the proper measure of compensation to be applied.

[3,4] The obvious answer to the suggestion that section 5.750, as added by St.1931, p. 856, is applicable is that it does not fit the situation which is presented by plaintiff's first amended complaint. Presumably, section 5.750 relates to absence from duty for which no leave has been obtained. Here, however, the teacher, as the pleading discloses, made written application for leave of absence. Chapter 7 of part 3 of the School Code bears the title "Resignations, Dismissals and Leaves of Absence." Article 8 of said chapter is entitled "Leaves of Absence." In this last-mentioned article there are three sections which relate specifically to leaves of absence. The first of these sections is section 5.720, as amended by St.1933, p. 2187, which confers general authority upon the governing boards of school districts to grant leaves of absence. Section 5.721, as added by St.1931, p. 1399, is more limited and empowers such boards to provide for leave of absence and to grant compensation during such leave to any teacher who is compelled to be absent because of accident, illness, or quarantine. The next succeeding section, which is section 5.722, as added in 1931, has heretofore received consideration. It is limited to leaves of absence for purpose of travel or study and contains the significant qualification that such travel or study shall be of a character that will be beneficial to the schools and pupils of the district. Since we have here the situation where the teacher admittedly applied for a leave of absence and did not take the risk of voluntarily absenting herself from her duties without securing express permission, those sections of the School Code which have a direct bearing on leaves of absence must govern and there is no occasion for attempting to apply another section of the code which apparently relates exclusively to unexcused absence from duty. The three sections of the School Code which relate specifically to leaves of absence are not

difficult of comprehension. The language employed therein is simple and the meaning is plain. There is no need to have recourse to a different section which occurs in another chapter and in which there is no reference to a leave of absence which was the very thing which the teacher here was anxious to obtain and which she did obtain.

[5,6] Since we have indicated our opinion that the pleading under discussion does not show on its face that the leave of absence which was requested by the teacher was granted for purpose of travel or study pursuant to section 5.722 of the School Code, as added in 1931, and have further demonstrated that section 5.750, as added in 1931, is not applicable to the situation disclosed by the complaint the next step is to discover whether or not there is any provision of the School Code under which the action taken by the board of trustees in granting the leave may properly have been taken. As heretofore observed, article 8 of chapter 7, part 3, of the Code, which is entitled "Leaves of Absence," contains three sections which relate expressly to leaves of absence. For reasons herein set forth we have concluded that the board's action, so far as the amended complaint discloses, was not taken pursuant to section 5.722, as added in 1931. It is not contended, as we understand, that the action was taken pursuant to the provisions of section 5.721, as added by St.1931, p. 1399, which authorize granting of leave to a teacher who is compelled to be absent because of accident, illness, or quarantine. The pleading is barren of any suggestion that the leave was granted for any such reason and no facts are alleged which indicate that such was the case. The elimination of sections 5.721 and 5.722 leaves section 5.720, as amended by St.1933, p. 2187, to be considered. The last-mentioned section is in the following language: "Governing boards of school districts shall have power to grant leaves of absence to persons employed in positions requiring certification qualifications." It is apparent that this section confers upon the governing boards of school districts a general power to grant leaves of absence and a broad discretion with respect to such a matter. No difficulty is therefore encountered in concluding that the pleading shows on its face that the action taken by the plaintiff's board of trustees was properly accomplished under the broad

power vested in it by the above-quoted language of section 5.720, as amended by St.1933, p. 2187.

It is furthermore our conclusion that the contention of defendants that the first amended complaint is vulnerable to attack by general demurrer because it alleges that the defendant Katherine Aslin took an appeal of her claim after its rejection by plaintiff's board of trustees to the superintendent of public instruction who decided that said defendant was entitled to payment of the claim is untenable for another reason. As heretofore noted this contention is based on the provisions of sections 5.760 and 5.761 of the School Code, which permit an appeal by a teacher whose salary is withheld to the above-mentioned official and declare that the judgment of such official shall be final.

[7] The two sections to which reference has last been made are contained in article 3 of chapter 8, part 3 of the School Code. The title of chapter 8 is "Salaries." The chapter contains three articles. The title of article 1 is "Fixing of Compensation." Article 2 is entitled "Payment of Salaries." Article 3 bears the title "Withholding of Teacher's Salary." It is apparent from an examination of the various sections which are included in these articles that they relate exclusively to the subject of salary and that they make no reference to the matter of leaves of absence, a subject which, as heretofore mentioned, is specifically and particularly treated in article 8 of chapter 7, part 3 of the Code, whose title is "Resignations, Dismissals and Leaves of Absence."

It may also properly be observed that the word "salary" has a well-understood meaning. It is defined in Black's Law Dictionary, third edition, as "a reward or recompense for services performed." In *White v. Hayden*, 126 Cal. 621, at page 627, 59 P. 118, 121, it is said: "'Salary' and 'wages' are synonymous. Both mean a sum of money periodically paid for services rendered (And.Law Dict.), and it is immaterial how the value of the services is ascertained." It is evident that a necessary element of the definition is the rendition of some sort of service. It is difficult to conceive how it may successfully be argued that an employee who, so far as appears, is given an unqualified leave of absence from performing any service for a period of one year can be said to

be entitled to any recompense by way of salary. The very definition of the term precludes the possibility that any salary could be due in such a situation or that a refusal to pay compensation during the period covered by the leave constitutes a withholding of salary.

[8] Because of the obvious meaning of the term "salary" and because of the fact that sections 5.760 and 5.761 occur in a chapter of the School Code which relates exclusively to the subject of "Salaries," we have no hesitancy in concluding that the contention of defendants that the amended complaint is subject to attack on the ground stated is lacking in merit.

The judgment is reversed, and the trial court is directed to overrule the demurrer and to permit defendants to file an answer to the first amended complaint within such time as the court may deem reasonable.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 186

CHAPMAN v. CITY OF LOS ANGELES.

Civ. 11422.

District Court of Appeal, Second District,
Division 1, California.

April 29, 1938.

Municipal corporations  523(2)

Property owners, who permitted city to deduct amount of street improvement assessment made against the owners' property from amount of damages awarded to the owners for release discharging city from claim for damages resulting to owners' property from change of grade of streets, were entitled to return of amount of assessments in cash upon city's abandonment of the improvement proceeding, as against contention that the owners, to be entitled to cash, should have accepted their awards in full and returned to the city the amount of assessments, since the law did not require property owners to do idle acts. St.1913, p. 954, as amended; p. 965, § 18; Civ.Code, § 3532.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Grace L. Chapman against the City of Los Angeles for return of money required to be paid to the city under a street improvement assessment procedure which was subsequently abandoned by the city. From an adverse judgment, the plaintiff appeals.

Reversed and remanded.

W. L. Pollard, S. L. Kurland, and Don Kitzmiller, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Frederick Von Schrader, Asst. City Atty., both of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff and appellant Grace L. Chapman is, for the purpose of collection, the assignee of three taxpayers and property owners in the City of Los Angeles, who seek the return of moneys required to be paid, and which it is claimed were paid, under an assessment procedure initiated under the provisions of the Statutes of 1913, page 954, as amended, designated as Act 8205, Deering's General Laws, and commonly referred to as the 1913 Street Improvement Act. From a judgment in favor of defendant city, this appeal is prosecuted.

In contemplation of the proposed improvement, the assignors of appellant were each awarded damages in consideration of the execution by each of them of a release and quitclaim in favor of the City of Los Angeles, discharging said city and its successors from all claims for damages of every nature which the property owners had or might have against the city by reason of the change of grade of the streets adjacent to the said assignors' property. The assignors were subject to an assessment levied against their respective properties for certain proposed improvements, consisting of paving sidewalks, grading, and incidental improvements upon and adjacent to their said properties. The assignors herein paid these assessments by offsetting them from the amount of damages theretofore awarded to them. Subsequently, the improvement proceedings were abandoned, the bonds were canceled, and the city council ordered the return of all assessments paid. Property owners who had paid their assessments in cash were repaid the amount of such assessments, and those property owners who had received the full amount

of their award and had permitted the assessment to go to bond received a cancellation of the bonds.

The appellant contends that the assessments paid by offset from an award of damages should be repaid upon an abandonment of the improvement and failure to proceed thereunder, pursuant to an ordinance of the city which provided that all assessments theretofore paid for said improvements should be returned.

Respondent, City of Los Angeles, concedes that if appellant's assignors had taken the full amount of their awards in cash, as they were legally entitled to do, and had thereafter returned in cash to the City of Los Angeles the amount of their respective assessments, they would be entitled without question to the return of said cash; but contends that an "offset" of the assessment is not equivalent to "payment." Respondent calls our attention to section 18 of the 1913 Street Improvement Act, p. 965, providing that all funds collected under the act are to be placed "in a special fund designated by the number or name of the proceedings," and argues that since appellant's assignors paid no cash or money into this special fund, they were not entitled to receive, and therefore did not receive, anything from that special fund. In other words, if appellant's assignors had taken the full amount of their awards and after cashing the vouchers issued therefor, had handed back to the city in cash the amount of the assessment, they would then have been entitled to receive back these cash payments when the proceedings were abandoned; but that because appellant's assignors permitted the city to deduct the amount of the assessment from their award, such "offset" does not entitle them to be repaid the amounts of these so-called "offsets."

With this contention of respondent we do not agree. In consideration of the award made to them, appellant's assignors parted with a valuable property right by selling to the city for the consideration named in the award a release and quitclaim of all damages which might or could arise by reason of a street improvement of a certain specified extent; in other words, the release represents a purchase by the city of an easement to cut the property adjacent to the property of appellant's assignors to an extent set forth in the specifications of said street improvement, and which right the city retains for all time. The mere fact

that appellant's assignors deducted the amount of the assessment from the amount agreed upon between themselves and the city as the value of said property right does not take away the right of said persons to recover the sum so paid upon the abandonment of the improvement and the authorized refunding of assessments paid thereunder. To say that in order to secure a return of their money appellant's assignors would have to accept the full amount of their award and then return to the city the amount of their assessment, does violence to the provisions of section 3532 of the Civil Code, which reads, "The law neither does nor requires idle acts." See, also, *Commercial Nat. Bank v. Roberts*, 49 Cal.App. 764, 765, 194 P. 751; *Christy v. Oakland Title Ins. & Guaranty Co.*, 132 Cal.App. 315, 320, 22 P.2d 737, and cases therein cited.

For the foregoing reasons, the judgment appealed from is reversed, and the cause remanded.

We concur: YORK, P. J.; DORAN, J.



26 Cal.App.2d 248

McQUEEN v. FRODING.

Civ. 10709.

District Court of Appeal, First District,
Division 1, California.

May 5, 1938.

Appeal and error ◊801(1)

Where respondent served and filed notice of motion to dismiss appeal, and no appearance was made on behalf of appellant at the hearing of the motion, and no opposition had been filed, appeal would be dismissed.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by L. J. McQueen against Charles L. Froding. From an adverse judgment, defendant appeals.

Dismissed.

William F. Rose, of San Francisco, and Paul C. Thorne, of Mill Valley, for appellant.

Knight, Boland & Riordan and J. W. Radil, all of San Francisco, for respondent.

PER CURIAM.

Respondent having served and filed notice of motion to dismiss appeal herein, and no appearance having been made on behalf of appellant at the hearing of the motion, and no opposition having been filed thereto, it is ordered that the motion be, and the same is hereby, granted upon the grounds stated therein, and accordingly the appeal is dismissed.



26 Cal.App.2d 150

**PEOPLE v. ONE PACKARD 6 TOURING
SEDAN.**

Civ. 10593.

District Court of Appeal, First District,
Division 2, California.

April 27, 1938.

1. Forfeitures ◊5

Evidence held not to entitle claimant of an automobile which was forfeited under the State Narcotic Act to avoid forfeiture on the ground that he did not make a reasonable investigation of moral responsibility, character, and reputation of the buyer, who was the operator of a house of prostitution. *St. 1933, p. 788, § 15.*

2. Forfeitures ◊2
Statutes ◊47

A provision of State Narcotic Act providing for the forfeiture of automobiles used in narcotic traffic was not unconstitutional as vague, arbitrary, discriminatory or confiscatory, or as ineffectual in controlling narcotic traffic. *St. 1933, p. 788, § 15.*

3. Constitutional law ◊48

All presumptions and intendments are in favor of the constitutionality of a statute and all doubts are resolved in favor of its validity.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Forfeiture proceeding by the People against One Packard 6 Touring Sedan, Engine No. T—7143, to which the seller filed a claim. Judgment for the People, and claimant appeals.

Affirmed.

R. G. Partridge, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

This is an appeal from a judgment declaring the forfeiture of a Packard automobile under the provisions of section 15 of the State Narcotic Act, St.1929, p. 388, as amended by St.1933, p. 788.

[1] The trial court found against appellant upon the question of whether there had been a "reasonable investigation of the moral responsibility, character and reputation of the purchaser," and appellant's main attack is directed against this finding. Appellant contends that the investigation made in the present case was a reasonable investigation within the meaning of the statute and that the evidence was insufficient to support the trial court's finding to the contrary. We find no merit in this contention.

The uncontradicted evidence showed that the purchaser of the automobile operated a house of prostitution near Livermore; that she had been arrested when her place was raided in January, 1936; and that she had entered a plea of guilty to a charge of vagrancy. She thereafter returned to the same place, which was again raided in December, 1936. She purchased the automobile in October, 1936. She was not then known to any of the parties concerned and, with the exception hereinafter noted, there was no evidence whatever tending to show any investigation other than an investigation of her financial responsibility. The only testimony tending to show any other investigation was given by an employee of appellant, but said testimony was flatly contradicted. Said employee testified that he telephoned to a garageman in Livermore and inquired of him concerning said purchaser's "char-

acter and financial status"; that said garageman had told him, among other things, that "she was a very wonderful woman and had a good standing in the community"; that she "comes from a very nice family, a wealthy family, she lives with her sister." Said garageman was called as a witness by respondent and he testified that the only inquiry made of him was as to her credit standing; that he knew her only as a customer; that he gave no other information and had no other information to give; that no request was made of him for any information concerning her moral responsibility, character, or reputation. In view of this conflicting testimony, it cannot be said that the evidence was insufficient to sustain the trial court's finding to the effect that there was no reasonable investigation of the moral responsibility, character, and reputation of the purchaser. *People v. One Harley-Davidson Motorcycle*, 5 Cal.2d 188, 53 P.2d 970; *People v. One Lincoln Eight*, etc., 12 Cal.App.2d 622, 55 P.2d 925.

[2,3] Appellant further contends that the statute is unconstitutional. It is argued that the statute is "vague and indefinite, uncertain and unreasonable"; also that it is "arbitrary and discriminatory"; also that it is "confiscatory"; also that "it is not in any wise effective or calculated to be effective in controlling the narcotic traffic." Appellant frankly concedes that "it is not contended that each one of the questions and objections here raised is alone sufficient to render the statute unconstitutional—but in the aggregate it is respectfully submitted that they cast serious doubt on the validity of a statute which requires innocent parties to act at their peril." But the rule is well settled that all presumptions and intendments are in favor of the constitutionality of a statute and that all doubts are to be resolved in favor of and not against its validity. 5 Cal.Jur. 628. Practically all of the arguments of appellant are fully answered in *People v. One Ford V8 Tudor Sedan*, 12 Cal.App.2d 517, 55 P.2d 908, and the authorities cited therein, and we are of the opinion that the claim that said statute is unconstitutional cannot be sustained.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

FECKENSCHER v. GAMBLE et al. *
Civ. 11701.

District Court of Appeal, Second District,
Division 2, California.

May 5, 1938.

Rehearing Denied May 26, 1938.

Hearing Granted by Supreme Court
July 1, 1938.

1. Fraud ⇨28

Where realty owner through brokers made agreement to exchange realty for property encumbered by trust deed alleged to have three additional years to run, and, upon discovering misstatement of realty owner concerning value of her property, a new agreement was executed providing that property to be given owner in exchange was subject to trust deed running for one year, which provision was substantially complied with, second agreement superseded original agreement precluding right to recover for alleged misrepresentations concerning trust deed.

2. Fraud ⇨50

In action for fraud and false representations arising out of a realty exchange, defendants' statements as to value of property, made to broker negotiating exchange, not shown to have been knowingly excessive or to be unjustified by the net income of the property, would not be presumed to be fraudulent, and, in absence of contrary evidence, transaction would be presumed to have been fair and regular. Code Civ.Proc. § 1963, subd. 19.

3. Fraud ⇨50

Fraud is never presumed.

4. Fraud ⇨22(1)

Where the advantages or disadvantages of a transaction depend upon opinions as to the value of the property to be purchased, each party must rely upon his own judgment and should investigate before making the contract.

5. Fraud ⇨11(2)

The representations of the owner of realty concerning its valuation were statements of opinion and would not support a finding of fraud entitling other party to realty exchange agreement to recover for fraud and false representations.

6. Fraud ⇨11(2)

The mere expression of opinions concerning the value of realty which is subject to inspection by the purchaser does not afford grounds for damage for false representations.

7. Fraud ⇨23

Where plaintiff, seeking to recover for fraud and false representations made by defendant as to property acquired by plaintiff in realty exchange, inspected the property, defendants' expression of opinion concerning value of realty would not afford ground for recovery for false representations.

8. Fraud ⇨23

Where plaintiff in negotiating exchange of realty with defendants had knowledge that brokers were representing both parties and all facts concerning the exchange were available to plaintiff and plaintiff had discussed transaction with her lawyer and with her banker, plaintiff was not absolved from exercise of reasonable or ordinary care in ascertaining facts notwithstanding confidential relationship of brokers to other defendants, so as to be authorized to recover from brokers on ground of fraud.

9. Fraud ⇨11(2)

The rule allowing vendors considerable latitude in expressing opinions as to the value of their property is also applicable to real estate brokers and agents.

10. Fraud ⇨11(2)

In action for fraud arising out of realty exchange, statements of brokers negotiating transaction as to value of property which plaintiff acquired in exchange and which she visited with an attorney, who advised her concerning transaction before it was completed, would not afford ground for recovery as against brokers.

11. Fraud ⇨13(1), 25

In realty owner's action for fraud arising out of realty exchange, representations of defendant concerning encumbrances upon property and surrounding property, which were for the most part shown to be true, and none of which resulted in damage to the plaintiff, would not afford ground for recovery.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Rosa Dell Feckenschcer against Louis S. Gamble and others for damages occasioned by the alleged false representations of defendants in effecting an exchange of realty with plaintiff. From a judgment for the plaintiff, defendants appeal.

Reversed.

Chambers & Lyman, by Robert Chambers, all of Hollywood, for appellants Gamble, Pringle, and Parker & Gamble, Ltd.

Gordon W. Levoy, A. Edward Nichols, and Clarence Stephens Brooks, by Gordon W. Levoy, all of Hollywood, for appellant S. C. Kleeman.

John Dean Barrick and William B. Etheridge, both of Pasadena, for respondent.

WOOD, Justice.

In this action plaintiff alleged that she had suffered damages occasioned by the fraud and false representations of the defendants. She obtained a judgment in the sum of \$17,760 against all of the defendants except Charles Wagner and Ruth Kleeman, the last named not having been served with summons and not having appeared in the action. The defendants against whom judgment was entered have filed this appeal.

Ruth Kleeman was the owner of a lot at the corner of Third and Hobart streets in the city of Los Angeles, upon which there had been erected a building containing stores on the ground floor and apartments above. Her father, defendant S. C. Kleeman, had some interest in the property and held a power of attorney from his daughter. The Kleemans had obtained this property a few months before the transactions hereinafter referred to, having secured it at a cost of \$40,000 on an exchange of properties with a party not concerned in the present litigation. S. C. Kleeman was a dealer in real estate and was a licensed real estate broker. He prepared a setup, or prospectus, setting forth the expenses of and income from the property and submitted it to a number of real estate brokers, among them defendants Parker & Gamble, Ltd., of Pasadena.

Defendant Gamble was the president of Parker & Gamble, Ltd. The plaintiff, Mrs. Feckenschcer, a widow, was a client of the firm, Mr. Gamble having acted in real estate transactions on behalf of her husband during his lifetime. Defendant Pringle was a salesman in the employ of Parker & Gamble, Ltd., and conducted most of the negotiations concerning the transactions referred to in the complaint, subject to the direction of defendant Gamble. Upon receiving the set-up from Kleeman, Gamble presented to plaintiff a proposition for the exchange of plaintiff's properties for the Third and Hobart property.

The negotiations commenced in March, 1935. An agreement was signed by plaintiff and Kleeman on March 29, 1935, wherein it was provided that plaintiff should exchange three properties, one in Pasadena and two in Detroit, for the Kleeman property. The Pasadena property consisted of a residence at 1711 East Maple street, encumbered with a trust deed in the sum of \$2,000. The Detroit properties consisted of a store building at Twelfth and Highland streets and a land contract upon which there was due the sum of \$7,000. Kleeman agreed to exchange the Third and Hobart property subject to a trust deed in the sum of \$25,000, due in March, 1938, and subject to street bonds payable \$200 per year and a balance of \$300 on the refrigerator equipment. An escrow was opened on April 4, 1935, and instructions were placed in the escrow by the parties. It was provided in the agreement that Parker & Gamble, Ltd., were "authorized to act as agents for all parties hereto and may accept commission therefrom." The trust deed on the property was actually for the sum of \$25,500, and was past-due but Kleeman had arranged with the owner of the trust deed for an extension on making a cash payment.

After the exchange agreement had been filed and the escrow established it was discovered that plaintiff's two Michigan properties were not as represented. The mortgage on the store building at Twelfth and Highland streets had been foreclosed and the period of redemption was running, the back taxes amounted to \$1,200 instead of \$350 as claimed and the balance due on the land contract was less than \$7,000 and the monthly installments were in arrears. The evidence is in conflict as to what took place when the true status of the Michigan properties was discovered. Kleeman testified that he wanted to withdraw. Mrs. Feckenschcer testified: "Mr. Gamble and Mr. Pringle did not want me to go through with it." She also testified that they told her that she should hurry through with the transaction and that it was a "wonderful deal" for her. By consent of all of the parties Kleeman went to Michigan and disposed of plaintiff's property, turning the proceeds into the escrow. On April 24, 1935, new escrow instructions were filed by both parties in which it was provided that plaintiff's properties should be turned in under the new conditions developed by Kleeman's disposi-

tion of the Michigan properties and that the Third and Hobart property should be turned in under the conditions that the trust deed should be extended for one year, the interest to be 8 per cent. instead of 7 per cent. and the monthly payments on the trust deed to be \$200. The transaction was finally consummated on these conditions and the escrow closed on July 16, 1935.

The trial court found that the defendants were engaged in a joint adventure, that they had made false representations to plaintiff, and had acted "in pursuance of a common purpose, plan and design, and with a wilful and deliberate common purpose and intention to deceive and mislead the plaintiff and induce the plaintiff to rely upon such false statements and representations, and, so relying thereon, to enter into and consummate said exchange." The court rendered judgment in plaintiff's favor on June 29, 1937, for the difference between the fair and reasonable value of the property received by her and the represented value thereof. Defendants contend that the court applied the wrong measure of damages, citing *Tulley v. Tranor*, 53 Cal. 274. In view of our disposition of other points in the case the question whether the trial court followed the correct rule in determining the amount of damages becomes immaterial.

[1] Defendants contend that the findings of the trial court that they made false representations are not sustained by the evidence. A review of the evidence contained in the lengthy record forces the conclusion that this contention must be sustained. Much emphasis is placed upon the alleged representation that the trust deed on the Los Angeles property was to run three additional years, whereas it was due at the time of the opening of the negotiations. Without considering the point made by defendant that an extension had been granted and would have been placed in escrow before it was closed, it is sufficient to point out that upon discovering the misstatements of plaintiff concerning the Michigan properties a new agreement was made by plaintiff and defendant Kleeman. This agreement superseded the original agreement. *Elko Mfg. Co. v. Brinkmeyer*, 216 Cal. 658, 15 P.2d 751. Under the terms of the new agreement the extension was to provide that the trust deed should run until April, 1936. Substantial compliance was made

by Kleeman with the new condition which had been agreed upon.

Plaintiff relies mainly upon the finding of the trial court that the Los Angeles property was represented to be of the value of \$40,000, whereas in fact it was worth only the sum of \$26,000, and the further finding that the personal property in the building was represented to be worth \$7,000 whereas it was in fact worth only \$3,240. Defendants testified that they considered the property worth the full value which had been placed upon it. The trial court based its findings upon the testimony of expert witnesses who testified at the time of trial concerning the value of the property nearly two years earlier. The set-up prepared by Kleeman showed that the rentals from the property were producing a net income of \$125 per month. The property was at the time of the negotiations fully rented at the rent designated in the set-up with the exception of one apartment, the rental value of which was placed in the set-up as \$20 per month. Plaintiff was informed of this vacancy. Defendant Kleeman did not meet plaintiff until after the consummation of the transaction. He did, however, inform Gamble that in his opinion the property was worth \$40,000. Gamble in turn made similar statements to plaintiff. After plaintiff took charge of the property rentals fell off and she was unable to make the payments on the trust deed, as a result of which the trust deed was foreclosed. It was established by uncontradicted evidence that the personal property involved had cost the sum of \$10,000.

[2,3] The trial court did not find that any of the defendants knew that the property did not have the value that they had placed upon it and the record does not disclose evidence which would have supported such a finding or circumstances from which it could reasonably be inferred that defendants knew that an excessive value was being placed upon this property. In view of the net income being derived from the property and the discussion between the parties concerning a new government loan which was in contemplation, it cannot be held that defendants were making fraudulent representations when they gave their opinions concerning the value of the property. Fraud is never presumed. On the contrary, it is provided in section 1963, subdivision 19, of the

Code of Civil Procedure that unless controverted by other evidence it is presumed that private transactions have been fair and regular.

[4-6] Plaintiff and Kleeman were dealing at arm's length. It is a general rule that each party must rely upon his own judgment and should investigate before making a contract. The rule is particularly applicable where the advantages or disadvantages of the transaction depend upon opinions as to the value of the property to be purchased. The valuation placed upon the property by Kleeman must be considered as his opinion only and under the circumstances here shown will not support a finding of fraud. Plaintiff lived but a few miles from the property and had ample opportunity to inspect the property and make her own conclusion as to its value. She did in fact inspect the property. In *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 71, 62 P.2d 1397, the court had under consideration alleged fraudulent representations concerning the physical condition of a residence purchased by the plaintiffs. The court stated (page 1399): "But the right to rely upon the representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and in making such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts." Mere expressions of opinion concerning the value of real estate which is subject to inspection by the purchaser do not afford grounds for damages for false representations. In *Finch v. McKee*, 18 Cal.App.2d 90, 62 P.2d 1380, the court held that statements concerning value (page 1382) "are charitably considered mere expressions of opinion which will not afford grounds for suit. Usually a purchaser is charged with knowledge of such excess enthusiasm and human frailty on the part of a vendor, for which he must make due allowance, and he is deemed to accept as true such representations, amounting to mere judgment or opinion, at his own peril."

[7-10] Although defendants Gamble and Pringle are in a position somewhat different from that of defendant Kleeman, since they were found by the court to be confidential agents of plaintiff, nevertheless the evidence is insufficient to justify

the findings upon which the judgment is predicated. The court found upon sufficient evidence that plaintiff knew that these defendants were representing both parties to the transaction. Several months went by in which numerous escrow instructions were filed by plaintiff. She inspected the property with her lawyer and discussed the transaction with her banker. She was in danger of losing her Michigan property, which was in course of foreclosure. No showing was made that she was not capable of understanding the various documents she signed or realizing the problems which would be hers upon the consummation of the exchange. Knowledge of all the facts concerning the exchange were available to her upon inspection of the property and an examination of the documents in the escrow. Although the existence of a confidential relationship may be considered in determining the liability of defendants Gamble and Pringle, the relationship does not absolve plaintiff from the exercise of reasonable or ordinary care. *Rutherford v. Rideout Bank*, Cal.App., 75 P.2d 101. The principal question involved was the value of the property to be purchased, which plaintiff visited with an attorney who advised her concerning the transaction. The rule allowing vendors of real estate considerable latitude in expressing opinions as to the value of their properties is also applicable to real estate brokers and agents.

[11] Plaintiff refers to other representations made by defendants which are claimed to be false. These representations for the most part were shown to be true and none of them resulted in damage to plaintiff. It is claimed that defendants stated that no other market was in the immediate vicinity whereas in fact another market was in the process of construction at the time of the negotiations. The court found upon sufficient evidence that plaintiff in due time was aware of the construction of the new market. Complaint is also made of the representation that the fixtures were clear of encumbrances except the sum of \$330 due on their purchase price, whereas the owner of the trust deed held a lien upon the fixtures to guarantee the payment of the amounts secured by the trust deed. It was shown without contradiction that plaintiff was informed that the title to the fixtures went with the building. She was therefore informed that the holder of the

trust deed must necessarily have a lien on the fixtures. Plaintiff further complains that the rentals had been assigned to the owner of the trust deed as security for the payments due. It was not shown that plaintiff suffered any damage on this account.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.



26 Cal.App.2d 235

THOMSEN v. BURGESON.

Civ. 11363.

District Court of Appeal, Second District,
Division 1, California.

May 4, 1938.

Rehearing Denied May 25, 1938.

Hearing Denied by Supreme Court
July 1, 1938.

1. Physicians and surgeons ☞18(8)

Cases dependent on knowledge of scientific effect of medicine or result of surgery must ordinarily be established by expert testimony.

2. Evidence ☞597

The rule requiring expert testimony applies only to facts peculiarly within knowledge of professional experts, and not to facts which may be ascertained by ordinary use of senses of nonexpert.

3. Evidence ☞20(1)

It is common knowledge that removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy.

4. Evidence ☞14

The location of the tonsils is a matter which is easily observable to anyone, and location and function of uvula and soft palate are matters of common knowledge, and of which the court can take judicial notice.

5. Trial ☞178

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

6. New trial ☞159

Trial ☞139(1), 140(1)

Although trial court may weigh evidence and determine credibility of witnesses on motion for new trial, it may not do so on motion for directed verdict.

7. Physicians and surgeons ☞18(9)

In action for malpractice in removing uvula and portion of soft palate, and injuring anterior and posterior pillars of throat during performance of a tonsillectomy and for trespass in removing such uvula and portion of soft palate, physician's negligence was for jury, notwithstanding absence of expert testimony.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Gary James Thomsen, a minor, by Mary Thomsen, his guardian ad litem, against Samuel Burgeson, to recover injuries for alleged malpractice in performance of a tonsillectomy upon plaintiff. From a judgment for defendant, plaintiff appeals.

Reversed.

Milan Medigovich and Ralph C. Curren, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal on behalf of plaintiff, a minor, by his mother and guardian ad litem, from a judgment in favor of defendant, a physician.

Plaintiff's complaint in the action, filed October 5, 1936, was in two counts: The first alleged malpractice of defendant in that, in July of 1934, during the performance of a tonsillectomy upon plaintiff (who at the time thereof was of the age of two years and eight months), defendant removed the uvula and a portion of the soft palate and injured the anterior and posterior pillars of plaintiff's throat; the second count was based upon trespass, alleging that defendant, without the consent of plaintiff or his parents, removed said uvula and portion of the soft palate. It is further alleged that since said operation and as a proximate and direct result thereof plaintiff is unable to swallow foods or liquids in a normal manner, doing so only with great difficulty, and is unable to properly and normally develop his speech.

The case was tried before the court with a jury. At the conclusion of plaintiff's case, the defendant rested without introducing any evidence, and thereupon made a motion for a directed verdict upon the ground, as respondent's counsel stated at the trial, that "there has been absolutely no medical testimony offered or expert testimony which condemns this treatment." The motion for a directed verdict was granted by the trial judge, and a verdict was returned accordingly against the plaintiff and in favor of defendant.

Appellant contends, in substance, that the court erred in sustaining objections to hypothetical questions asked of plaintiff's expert witness; that expert testimony was not essential to plaintiff's case; that the court erred in directing a verdict on plaintiff's first cause of action, which alleged malpractice; and that as to the second cause of action, a case of trespass was fully established and the issue should have been submitted to the jury.

Respondent contends, to the contrary, that: "There is positively nothing in this case at bar of which the court could take judicial notice and there are no facts which may be ascertained by the ordinary use of the senses of a non-expert, because the question whether or not the uvula could be injured or partly removed in the course of a tonsillectomy is a question that can only be solved upon the criterion of the technique employed by the physician. Whether this technique conformed to the ordinary standard required by law of a physician is not a matter, however, which may be ascertained by the ordinary use of the senses of a non-expert."

Without going into further detail, it is sufficient to state that the evidence reveals a situation which clearly takes the case at bar out of that class of cases in connection with which expert testimony is indispensable. In *Brown v. Shortlidge*, 98 Cal.App. 352, 277 P. 134, 135, the court quotes with approval from *Evans v. Roberts*, 172 Iowa 653, 154 N.W. 923, which last-mentioned case is singularly applicable to a determination of the questions involved in the within appeal: "It is appellant's contention that there is no evidence in the record to support a finding that he was negligent. With this we are unable to agree. Assuming, for the purposes of this case, the soundness of the argument that, in performing an oper-

ation, a surgeon is not held to guarantee results, and that, if he possesses the measure of skill which the law requires, a mere failure of judgment in his choice of methods and means is not actionable negligence, such concession is insufficient for the disposition of the issue of negligence in this case as a matter of law. This is not the ordinary case where a practitioner is sought to be charged with liability for alleged improper treatment of some bodily ailment or infirmity. He was employed to remove the adenoids from the plaintiff's throat, and there is neither claim nor proof that he did not successfully remove them. *His negligence, if any, was in failing to take due care to avoid injury to the undiseased parts in the vicinity of which the operation was performed*; and while it may be true that, had the operation upon the adenoids been unsuccessful and disappointing, no inference of negligence or want of skill would arise therefrom, it does not follow that this rule applies with the same force to an injury done by him to sound and undiseased parts of the plaintiff's person, which he was not called upon to treat and did not pretend to treat. If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek, and by an awkward move thrusts his needle into the patient's eye, or if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available. "It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated, if reasonable care be exercised by the operator." * * *

The application of the doctrine has never been confined to any set formula of fact. If a patient should visit a surgeon for the purpose of having a mole removed from the right foot and awoke from an anesthetic minus his left arm, it is certain that some satisfactory explanation would be required to stop the fact itself from broadly proclaiming the negligence of the surgeon. The

difference between such a case and the case at bar is one of degree only. If the surgeon in the case at bar could stand upon some imaginary rule of law to the effect that when one submits himself to surgical treatment he may expect anything to happen, so likewise could the surgeon in the supposed case. We think the true rule is expressed in the cited cases, and the distinction made plain between cases involving the merits of a diagnosis and scientific treatment and cases where, during the performance of surgical or other skilled operations an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject." (Italics added.)

Brown v. Shortlidge, supra, is cited with approval in *Ales v. Ryan*, 8 Cal.2d 82, 95, 64 P.2d 409, 415, wherein the court declares: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care." See, also, *Ragin v. Zimmerman*, 206 Cal. 723, 729, 276 P. 107; *Nicholas v. Jacobson*, 113 Cal.App. 382, 385, 298 P. 505.

[1, 2] The rule has been declared as follows: "It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. * * This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a non-expert." *Barham v. Widing*, 210 Cal. 206, 214, 291 P. 173, 176.

[3, 4] So far as an understanding of the operation involved herein is concerned, it would appear to be a matter of common knowledge that the removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy. The location of the tonsils is a matter which is easily observable to anyone, and the location and function of the uvula and soft palate are matters of common knowledge, and of which the court can take judicial notice. Therefore, there was evidence in the record, at the time the motion for a directed verdict was granted, sufficient to support a verdict for plaintiff had such verdict been returned.

[5, 6] As the Supreme Court has declared: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" [Citing cases.] Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 228, 263 P. 799. A motion for a directed verdict 'is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence. The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. * * * If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict.' *Hunt v. United Bank & Trust Co. of Cal.*, 210 Cal. 108, 291 P. 184. In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.*" In re *Estate of Flood*, 217 Cal. 763, 768, 21 P.2d 579, 580; see, also, *Collins v. Nelson*, 16 Cal.App.2d 535, 61 P.2d 479.

[7] In the light of the foregoing it was therefore error for the court to grant defendant's motion for a directed verdict.

A consideration of the other questions raised in the appeal is unnecessary.

For the foregoing reasons the judgment is reversed.

We concur: YORK, P. J.; WHITE, J.



26 Cal.App.2d 249

In re HERBST'S ESTATE.

MITCHELL et al. v. SEIB et al.

Civ. S. C. 64.

District Court of Appeal, Second District,
Division 1, California.

May 5, 1938.

1. Executors and administrators §501

A petition of the personal representative and her attorney for extraordinary fees need not state the facts in support thereof with all the preciseness and detail required in a complaint, and the sufficiency of the petition is not to be tested by the rules applicable to pleadings. Probate Code, §§ 902, 910.

2. Executors and administrators §501

A petition of personal representative and her attorney for extraordinary fees should state claims with sufficient particularity so that court and those interested in estate may be informed fully of the nature of the extraordinary services allegedly rendered as well as of the necessity and value of such services to the estate, and be thereby enabled to distinguish the items which are a proper charge from those which may be unjust and improper. Probate Code, §§ 902, 910.

3. Executors and administrators §501

A personal representative or attorney petitioning for extraordinary fees has burden of proof as to the necessity of the services. Probate Code, §§ 902, 910.

4. Executors and administrators §501

A petition of personal representative and attorney for extraordinary fees should con-

tain a full and complete disclosure of the extent and character of services from which court may properly determine the just and reasonable amount to be allowed. Probate Code, §§ 902, 910.

5. Executors and administrators §501

Petition of personal representative and her attorney for extraordinary fees which did not set forth nature of extraordinary services allegedly rendered with particularity was insufficient. Probate Code, §§ 902, 910.

6. Pleading §236(1)

The granting of permission to amend pleadings is a matter within sound discretion of trial court, but court should allow amendments liberally to the end that justice may be achieved.

7. Executors and administrators §501

Where objection to petition of personal representative and attorney for extraordinary fees went only to fact that nature of services allegedly rendered was not set forth with sufficient particularity, and where there had been no previous motions to amend, denial of motion for permission to amend petition was error. Probate Code, §§ 902, 910.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceedings in the matter of the estate of Elizabeth J. Herbst, deceased, wherein Louise B. Mitchell, as administratrix of the estate of Willis S. Mitchell, deceased, and as personal representative of Willis S. Mitchell, as executor of the estate of Elizabeth J. Herbst, deceased, and William Ellis Lady, attorney for Louise B. Mitchell, administratrix of the estate of Willis S. Mitchell, deceased, and as personal representative of Willis S. Mitchell, as executor of the estate of Elizabeth J. Herbst and as attorney for Willis S. Mitchell, as executor of the estate of Elizabeth J. Herbst, deceased, filed petitions for extraordinary fees which were opposed by Etta B. Seib and another. From an order denying fees for extraordinary services, the petitioners appeal.

Order reversed, and cause remanded, with directions.

William Ellis Lady, of Los Angeles, for appellants.

Mier & Schaper, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by Louise B. Mitchell, administratrix of the estate of Willis S. Mitchell, deceased, who during his life and at the time of his death was executor of the estate of Elizabeth J. Herbst; and also by William Ellis Lady, attorney for said executor, from that portion of an order in probate made by the superior court of Los Angeles county denying the allowance of any extraordinary fees to either the executor or his attorney.

The petition for extraordinary fees contained the following averments:

"That the said William S. Mitchell as such Executor and the said William Ellis Lady as his attorney have performed a large amount of extraordinary services in the settlement of said estate; that no amount has ever been fixed therefor and that the court should now fix the amount thereof and order same paid.

"That although the said William Ellis Lady appeared as counsel for the said Willis S. Mitchell in the various and sundry matters affecting said estate, the said Willis S. Mitchell also took an active part in all legal matters and was present in court the same number of days that the said William Ellis Lady appeared as counsel in the prosecution and defense of actions brought for and on behalf and against said estate."

The sole ground upon which the probate court denied extraordinary fees was that the petition therefor did not state facts sufficient to justify such allowance.

Sections 902 and 910 of the Probate Code authorize the court to allow such amounts as the court may deem just and reasonable for extraordinary services rendered by an executor and his attorney.

[1-5] While it may be conceded that a petition for such allowance need not state the facts in support thereof with all the preciseness and detail required in a complaint, and that the sufficiency of such a petition need not be tested by the rules applicable to pleadings, still it is the duty of a petitioner for such fees to state with sufficient particularity his claim for extraordinary compensation so that the court, as well as those interested in the estate and who are authorized to object thereto, may be informed fully of the nature of the extraordinary services allegedly rendered, as well as of the

necessity and value of such services to the estate, and be thereby enabled to distinguish the items which are a proper charge from those which may be unjust and improper. The petitioner in such a proceeding is charged with the burden of proof as to the necessity of the services, and there should be a full and complete disclosure of the extent and character thereof from which the court may properly determine the just and reasonable amount to be allowed. *Estate of Murphy*, 171 Cal. 697, 700, 154 P. 839; *Estate of Partridge*, 31 Or. 297, 51 P. 82; *Bancroft's Probate Practice*, vol. II, p. 816, notes 13 to 15, inclusive. The petition before us falls far short of these standards.

Appellants' second ground of appeal, however, presents a more serious question, and that is whether the trial court abused its discretion in denying petitioners' motion for leave to amend their petition. In that connection, it appears that during the hearing the court announced that in its opinion the petition did not state sufficient facts; whereupon Mr. Lady representing petitioners, moved the court for permission to amend the petition, and which motion was thereupon denied.

[6, 7] While it is the rule that the granting of permission to amend pleadings is a matter within the sound discretion of the trial court (*Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305), courts should allow amendments liberally to the end that justice may be achieved. Where, as in the instant case, the objection to the petition went only to the fact that the nature of the services allegedly rendered was not set forth with sufficient particularity, and where there had been no previous motions to amend, the court should have granted petitioners' motion for such leave, because they were entitled to an opportunity to amend their petition by alleging with more preciseness the facts upon which they relied for their claims for extraordinary services. *Exchange Nat. Bank of Tulsa v. Hurley*, Cal.App., 70 P.2d 975.

For the reasons last stated, that portion of the order denying fees for extraordinary services to the executor and his attorney, from which this appeal is taken, is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

26 Cal.App.2d 157

TITLE INS. & TRUST CO. v. BANDINI ESTATE CO.

Civ. 11382.

District Court of Appeal, Second District,
Division 1, California.

April 27, 1938.

Rehearing Denied May 25, 1938.

Hearing Denied by Supreme Court
June 24, 1938.**1. Evidence** $\S$ 441(1)

Where note has been indorsed in blank or without limitation, qualification, or restriction, oral testimony or other evidence of negotiations leading up to execution of a written agreement is inadmissible to show agreement that note was to pass without recourse. Civ.Code, $\S$ 1639.

2. Pleading $\S$ 216(2)

In ruling upon demurrer in action against indorser of notes, court had right to consider all allegations, and if, from consideration thereof, an extrinsic ambiguity appeared in wording of indorsement, recourse could be had to portions of complaint setting forth circumstances under which indorsement was made, situation of subject of instrument, and of parties to it. Code Civ.Proc. $\S$ 1856, 1860.

3. Bills and notes $\S$ 289

An assignment of indorser's right, title, and interest in and to notes and in and to trust deed securing them constitutes a "qualified indorsement" making indorser a mere assignor of title to instruments. Civ.Code, $\S$ 3119.

4. Pleading $\S$ 216(2)

In determining demurrer involving question whether indorsement of indorser sued on notes was general or qualified, court could draw inferences concerning parties' intention from allegation that, prior to transfer of notes at a discount, indorser had refused request to extend time for payment thereof. Code Civ.Proc. $\S$ 1960.

5. Pleading $\S$ 216(2)

In determining on demurrer whether indorsement of notes stating that they were transferred and assigned with all rights accrued or to accrue under deed of trust securing them was a general or qualified indorsement, court was entitled to consider all allegations indicating intent of indorser. Code Civ.Proc. $\S$ 1856, 1860.

6. Bills and notes $\S$ 462(1)

In action on notes against indorser, complaint alleging that indorser, after refusing request for extension of time for pay-

ment of notes held by it, thereafter offered to assign all of its right, title, and interest therein to holder, that notes were subsequently transferred in compliance with terms of offer by written indorsement stating that they were transferred and assigned with all rights accrued or to accrue under deed of trust securing them, indicated that indorser was a mere qualified indorser without recourse of payment, and was therefore insufficient to state cause of action. Civ. Code, $\S$ 3119, 3144.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Title Insurance & Trust Company against the Bandini Estate Company to recover against defendant as the indorser of certain promissory notes. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for appellant.

U. T. Clotfelter and L. W. Butterfield, both of Los Angeles, for respondent.

WHITE, Justice.

This is an action brought by plaintiff to recover judgment against defendant as the indorser of certain promissory notes secured by a deed of trust covering real estate in Los Angeles county. Plaintiff sought to recover the amounts remaining due on the notes after the security had been exhausted through a trustee's sale.

Defendant demurred both generally and specially to the amended complaint filed herein, and this appeal is prosecuted from the judgment entered after an order made by the court below sustaining defendant's demurrer without leave to amend.

The transaction by which the notes involved were issued is one in which the defendant negotiated a sale of certain real estate owned by it to O. Nicholas Gabriel and Associates for the purpose of creating a subdivision trust to subdivide the property and sell it in lots at retail. Part of the purchase price was paid in cash and the remainder was to be paid out of the proceeds of the sale of lots after such subdivision. The amended complaint alleges: "That said O. Nicholas Gabriel and Associates desired and requested that the unpaid portion of said purchase price of said real estate be secured by a payee's interest

under said trust declaration; that said Arcadia Bandini Baker Estate Company refused so to do, and insisted that, if they had 'to take the land back', they wished to get it back in a definite and certain form, so that they could get title quickly, and insisted that a note and deed of trust be executed by a person designated to act as dummy, evidencing the unpaid portion of the purchase price of said real estate."

The trust declaration was prepared accordingly and expressly provided that the sole remedy against any persons interested in the property should be as provided in the declaration of trust, namely, by the application of release prices of lots sold under the unpaid purchase price, and as provided in the deed of trust executed by such "dummy." From the foregoing it is apparent that respondent took the position of a creditor with a first lien and did not enter into a joint venture with the purchaser.

The transaction was consummated and the property was conveyed to the trustee subject to a deed of trust securing five promissory notes for \$153,977 each, dated December 15, 1923, bearing interest at the rate of 6 per cent., one due January 1, 1926, and one due on the 1st day of January of each year thereafter to and including January 1, 1930. Two of the promissory notes were paid promptly when due, but in April, 1927, a change in selling conditions of such subdivisions came about, so as to make it quite probable, if not certain; that the remaining promissory notes could not be paid when due out of the sales of the lots. Confronted with this situation, the subdivider applied to respondent for an extension of time, which application was refused. Then the subdivider requested respondent to sell the notes, so that the assignee of them could grant such extension. In response to this request, respondent, under date of June 15, 1927, wrote appellant, making an offer to the latter to sell the notes, which writing was in words and figures as follows:

"Mr. O. Nicholas Gabriel, the Manager for the Beneficiaries under the above Trust, has applied to the undersigned to sell the three notes remaining unpaid, in order that the purchaser thereof may extend the maturity dates to July 1, 1932. Complying with his request, *we hereby offer to assign, transfer and set over unto your Company, or its nominee, all of our right, title and interest in and to said notes and in and to the said Trust Deed securing the same,*

upon payment to us of the foregoing total unpaid principal balance of \$461,900.00, plus accrued interest from June 15, 1927, to date of payment, less a discount equal to 5% of said unpaid principal balance, said discount amounting to \$23,095.00, making the net amount payable to us for said assignment the sum of \$438,805.00, plus said accrued interest.

"The undersigned hereby respectfully requests that your company arrange for the purchase of said notes on the above basis.

"This offer shall remain open for a period of thirty days from the date hereof. If the said notes are not purchased by you pursuant to the above provisions within that period, then this offer shall be null and void at the expiration of said thirty day period." (*Italics added.*)

On June 16, 1927, respondent placed the notes in escrow with appellant, with instructions authorizing delivery thereof upon receipt of the amount of money specified in the offer, and on the next day appellant placed the requisite amount of money in said escrow, with instructions that it be paid over to respondent for said notes "transferred and assigned to Title Insurance and Trust Company by the payee as of the date of June 17th, 1927." There were three promissory notes transferred, and upon the back of each were the words and figures following:

"Los Angeles, California
"June 17, 1927.

"For Value Received we do hereby transfer and assign to Title Insurance and Trust Company the within note, together with all rights accrued or to accrue under the deed of trust securing the same so far as the same relate to this note.

"[Corporate Seal]

"Arcadia Bandini Baker Estate Company
"By John T. Gaffey, Pres.

[Signed]

"By W. H. Wilcox, Secy.

[Signed]"

Appellant first contends upon this appeal that respondent was a general indorser and not a qualified indorser of the notes in question. The applicable sections of the Negotiable Instruments Law read as follows:

"A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar im-

port. Such an indorsement does not impair the negotiable character of the instrument." Section 3119, Civ.Code.

"A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 3144, Civ.Code.

Respondent concedes that the bare wording of the assignment upon the notes here involved, standing alone, constitutes a general indorsement under the authorities cited by appellant, and it is not disputed that an assignment reading in substance, "I hereby assign the within note," standing by itself, is an unqualified indorsement; but respondent earnestly urges that in this case these words do not stand alone, but that the allegations of the amended complaint and the record before the court show that the transfer of the notes here involved was made in pursuance of an express and specific contract between the appellant and respondent to assign only respondent's "right, title and interest in and to the notes," and that the actual agreement and intention of the parties was that the notes would be transferred without recourse; that, the appellant having pleaded not only what it calls the indorsement of the notes, but the actual contract between the parties pursuant to which the transfer of the notes was made and all the facts and circumstances leading up thereto, there is created an ambiguity as to the meaning of the so-called indorsement which entitles the court to look into, consider, and give effect to all of the facts and circumstances surrounding the alleged indorsement and appearing on the face of the amended complaint, to ascertain from such allegations the intention of the parties in the making and acceptance of the alleged indorsement. Sections 1856, 1860, Code Civ.Proc.

[1-6] It needs no citation of authority for the statement that in the case of a blank indorsement or an indorsement without limitation, qualification or restriction, oral testimony or other evidence of negotiations leading up to the execution of a written agreement is inadmissible to show any agreement between the indorser and the indorsee of a promissory note that the note was to pass without recourse, because section 1639 of the Civil Code definitely provides that when a contract is reduced to writing the intention of the parties is

to be ascertained from the writing alone, if possible; subject, however, to certain provisions of the Civil Code. In ruling upon the demurrer, the court below had a right to take into consideration all of the averments and allegations contained in the amended complaint, and if, from a consideration thereof, there appears an "extrinsic ambiguity" in the wording of the indorsement, recourse may be had to those portions of the amended complaint which set forth the circumstances under which the indorsement was made, the situation of the subject of the instrument, and of the parties to it. In the instant case, the trial court had before it the allegations contained in the amended complaint that the transfer of the notes in question was made pursuant to a written specific offer made by respondent to appellant under date of June 15, 1927, and by which offer respondent agreed to assign, transfer, and set over unto appellant or its nominee all of the "right, title and interest in and to said notes and in and to the said trust deed securing the same," and which words just quoted constituted a qualified indorsement, making the indorser a mere assignor of the title to the instruments. *Cristina v. Mattenberger*, 212 Cal. 670, 300 P. 450; *Hammond Lumber Co. v. Kearsley*, 36 Cal. App. 431, 172 P. 404. By the amended complaint the court was also apprised of the fact that respondent sold the notes to the appellant at a discount. It must also be borne in mind that the court had before it and could draw inferences as to the intention of the parties from the allegations contained in the amended complaint that prior to the transfer of the notes in question from respondent to appellant the former had been asked to consent to an extension of time for payment and refused such request. In the face of such refusal, coupled with the transfer of the notes to appellant at a discount, it hardly seems reasonable to infer, from the course of business, that such transfer would be made coupled with an assumption of an obligation to make payment of the notes in full in case the maker failed to do so. Section 1960, Code Civ.Proc.

That appellant accepted the offer of respondent to transfer the notes with a limited indorsement is evidenced by the averments in the amended complaint that appellant received and accepted the notes in strict compliance and conformity with the terms and provisions of respondent's offer

as contained in its letter of June 15. The court was entitled to consider all of the allegations contained in the amended complaint to indicate and show the intention of the indorser and for the purpose of placing a proper construction upon the indorsement in dispute. When considered in their entirety, the allegations of the amended complaint clearly indicate and prove that respondent's indorsement on the back of the promissory notes did not make it a general indorser, but that said indorsement was qualified, that is, that it was a mere assignment for the purpose of transferring the interest or title of respondent to appellant, and that respondent was a qualified indorser without recourse of payment. The court below was therefore correct in sustaining the demurrer without leave to amend upon the ground that the amended complaint failed to state facts sufficient to constitute a cause of action on the part of appellant against respondent.

In view of the foregoing, no other points raised demand our consideration.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



26 Cal.App.2d 230

**FOSTER et al. v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY.**

Civ. 11694.

District Court of Appeal, Second District,
Division 1, California.

May 4, 1938.

Rehearing Denied May 31, 1938.

I. Constitutional law 43(1)

Clients instituting proceeding under statute for change of attorneys and requesting court to order fees and compensation for services rendered by old attorneys were estopped from thereafter questioning constitutionality of portion of statute authorizing court to determine amount and terms of payment of fee or compensation to be paid by the clients. Code Civ.Proc. § 284, as amended by St.1935, p. 1647.

2. Attorney and client 75(2)

Clients petitioning for change of attorneys could not complain that court exceeded its power in ordering fees and compensation to be paid for services rendered by former attorneys, where order was made pursuant to statute relating to change of attorney and under contract for contingent fees executed by clients and attorneys. Code Civ.Proc. § 284, as amended by St.1935, p. 1647.

Mandamus proceeding by F. E. Foster and others, as trustees of certain trusts and trust estates known and described as Julian Wells 1, 2, 3 and 11, Santa Fé Springs Oil District, Los Angeles County, Cal., against the Superior Court of the State of California in and for the County of Los Angeles, for substitution of petitioners' attorneys.

Alternative writ discharged, and petition for peremptory writ denied.

Paul R. Hutchinson, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Counsel, Olson & Olson, and Homer N. Boardman, all of Los Angeles, for respondent.

YORK, Presiding Justice.

By this proceeding petitioners seek a peremptory writ of mandate directing respondent to substitute Paul R. Hutchinson as their attorney in the place and stead of Olson & Olson. C. L. Olson and R. C. Olson are attorneys at law and comprise the firm of Olson & Olson. They are attorneys of record of the petitioners, who are interveners and cross-complainants in the superior court case of Carson v. Barnhart-Morrow Consolidated, which is an action to quiet title to and to determine adverse interests in personal property, i. e., the sum of \$43,451.25 impounded in the custody of the court, and \$7,000 in the possession of a local banking institution. By said action petitioners seek to determine their right to have and receive 7½ per cent. of 70 per cent. of the proceeds of the gross production from certain oil leasehold estates. In pursuance of such endeavor a cross-complaint in intervention was prepared and filed on February 4, 1937, by said Olson & Olson, in accordance with an agreement between said petitioners and said attorneys, whereby the latter were to

perform legal services for the former in connection with said superior court case upon a contingency basis, to wit:

"In consideration and as full compensation for any and all services of the second parties in connection with the prosecution of said claim and in any and all actions and legal proceedings for the establishment thereof and the recovery of moneys thereon, the second parties shall have and receive, and the first parties shall assign to the second parties one-third of all moneys recovered and of all interests and rights established under said claim. If no moneys or rights or interests are recovered or established thereon, then the second parties shall receive nothing for their services in connection with the prosecution of said claim.

"The one-third contingency interest hereby agreed to be paid and assigned to said second parties relates to one-third of the 7½% interest hereinbefore referred to, and in the event that not more than two-thirds thereof is recovered and established upon said claim of the first parties and the unit-holders they represent, then the contingent fee agreed to be paid and assigned to said second parties shall be one-half of the amount and interests so recovered and established."

On July 19, 1937, after the attorneys had fully prepared their case and the same had been set for trial, the petitioners herein filed their notice of motion for an order "substituting Paul R. Hutchinson as attorney for said moving parties for and in the place of Olson and Olson, previous counsel for said parties, and will move the Court at said time to set the fees and compensation of said Olson & Olson for services rendered to date in accordance with the provisions of C. C. P. Sec. 284." The affidavit of petitioner Penn in support of said notice of motion recites: "That your affiant desires to show to the court that in addition to their desire to exercise their prerogative to change counsel for general reasons, that on or about December 22, 1936, the said Olson & Olson filed suit against these moving parties for the balance due on their claim of \$60,000 for attorneys fees rendered in another matter * * * that your affiant believes that the claim is unconscionable under the circumstances of the case, feels that it is to the best interest of the trust and your affiant that they obtain other counsel in accordance with their notice of motion attached hereto." On August 5, 1937,

the court granted the motion for substitution "upon condition that E. E. Foster and H. A. Penn, as trustees and managing agents, deliver to Olson and Olson a good and sufficient assignment of their right, title and interest to 2½% of 70% of the production of Julian Wells 1, 2, 3, and 11, the same coming from the 7½% under dispute in this action and not from any other source. If such assignment is not made on or before August 9, the motion for substitution will be denied." Thereafter, petitioners filed notice of motion for reconsideration by the court of its order of August 5th, and also notice of a further motion for substitution of attorneys on the ground that the contingency agreement was oppressive and the case had not been prosecuted with due diligence. Said motion for reconsideration was heard on September 15, 1937, and on November 18th, the court made its order denying substitution of attorneys except upon the same terms and conditions as provided in its original order of August 5, 1937.

The terms and conditions contained in said order of August 5th were fixed upon the application of petitioners herein for an order determining the fees and compensation of the attorneys Olson & Olson, pursuant to the provisions of section 284 of the Code of Civil Procedure, as amended by Stats. 1935, p. 1647, to wit: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: * * * 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other *except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party.*" (The italicized portion was added by the 1935 amendment.)

Petitioners in this proceeding in mandamus urge: (1) That the 1935 amendment to section 284, supra, is unconstitutional and void; (2) that under said section they are entitled to an order of substitution as a matter of right free from any conditions; (3) that even though said section is constitutional, the order of the court exceeded the limitation of its power and authority.

[1] By initiating the proceeding under section 284 of the Code of Civil Procedure and by directly requesting the court to set

the fees and compensation of the attorneys for services rendered, petitioners waived their right to and are now estopped to question the constitutionality of the statute under which they proceeded. "A person may by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Cor.Jur. 769; 11 Am.Jur. 766, 767; Gregory v. Hecke, 73 Cal.App. 268, 284, 238 P. 787; Ison v. Western Vegetable Distributors, 48 Ariz. 104, 59 P.2d 649, 654, 655; Nuckolls v. U. S., 10 Cir., 76 F.2d 357, 360.

In the Ison Case, *supra*, the petitioner instituted a proceeding for compensation under the Workmen's Compensation Act, and during the course thereof he raised the question of the constitutionality of the act, claiming he had been denied due process of law, in that the Industrial Accident Commission was not, within the meaning of the Fourteenth Amendment to the Federal Constitution, "that fair and impartial tribunal which every man is entitled to in determining his legal rights." It was there held (48 Ariz. 104, 59 P.2d 649, at pages 654, 655) that "petitioner was not brought before the commission against his will, nor by any act on its part. He invoked its jurisdiction voluntarily, for the purpose of securing from it an affirmation of an alleged right, created by the same act which made the commission the judge as to whether such right existed in a particular case. It is the general rule of law that when a party invokes the benefit of a statute, he may not, in one and the same breath, claim a right granted by it and reject the terms upon which the right is granted. *Tovrea Packing Co. v. Livestock Sanitary Board*, [44 Ariz. 151], 34 P.2d 420. * * * 'More than this [quoting from *Hawkins v. Bleakly*, 243 U.S. 210, 216, 37 S.Ct. 255, 61 L.Ed. 678, 684, Ann.Cas.1917D, 637], the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may

not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. *Daniels v. Tearney*, 102 U.S. 415, 26 L.Ed. 187; *Grand Rapids & I. R. Co. v. Osborn*, 193 U.S. 17, 24 S.Ct. 310, 48 L.Ed. 598.'"

[2] As to petitioners' contention that the court, by making its order herein (which was made at their own request), exceeded its power and authority, the record shows that such order was made pursuant to the provisions of section 284 of the Code of Civil Procedure, as amended, and also under the terms of the contract for contingent fees executed by the parties hereto. There is therefore no merit in such contention.

The alternative writ is discharged and the petition for a peremptory writ of mandate is denied.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 163
ASTOR v. SAFEWAY STORES, Inc., et al.
 Civ. 11380.

District Court of Appeal, Second District,
 Division 1, California.

April 27, 1938.

Hearing Denied by Supreme Court
 June 24, 1938.

1. Appeal and error ⇨932(1)

In considering an attack upon a verdict as inadequate or excessive, reviewing court must treat every conflict in the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can be reasonably drawn in support of his claim.

2. Damages ⇨130(4)

\$100 for cut on the mouth sustained when drinking buttermilk which contained broken glass held adequate.

3. Appeal and error ⇨1071(6)

Where court in buyer's action for injuries sustained in drinking buttermilk containing glass found that buyer sustained only a cut on the mouth, failure to make findings as to special damage for loss of time and decreased earning power, which

findings would have been adverse to plaintiff, was not reversible error.

4. Trial $\S$ 397(1)

Specific finding as to each of several material issues need not be made, where findings, taken as a whole or construed together, fairly show that they include court's conclusion of all material issues.

5. Appeal and error $\S$ 934(2)

If there be a finding upon which a judgment may rest, every presumption being in favor of the judgment, it will be concluded by reviewing court that trial court rested its judgment upon such finding.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Louis Astor against Safeway Stores, Inc., a corporation, and others, for injuries resulting from the consuming of buttermilk containing broken glass. From a judgment for plaintiff for \$100 against named defendant, plaintiff appeals.

Affirmed.

D. Z. Gardner, Ira A. Gwin, and Max Tendler, all of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

YORK, Presiding Justice.

The complaint herein alleges that on the 14th day of January, 1936, appellant purchased a bottle of buttermilk for immediate consumption from the respondent Safeway Stores, Inc.; that he started to drink the same and felt in his mouth some particles which he believed to be ice; that after consuming a small amount of the buttermilk he became aware of a larger particle in his mouth which, upon examination, he discovered to be a piece of broken glass five-eighths of an inch in length and one-fourth of an inch in thickness, slightly circular in form, and at the same time he realized that he had been swallowing small particles of glass. He thereupon exhibited to the clerk from whom he had purchased the buttermilk both the bottle and the large piece of glass which he had taken from his mouth. It is further alleged that as result of the negligence of said respondent Safeway Stores, Inc., appellant was greatly injured and damaged in that his mouth and throat were cut and lacerated by said broken glass; that by reason of swallowing the

same before he discovered what it was, he suffered continuous pains in his throat and mouth and in his stomach and intestines and became sick and nauseated thereby; "that he still suffers such pains and reasonably expects that he will so suffer for at least one year and that at any time one or more of said pieces of glass swallowed by him may perforate the walls of his stomach and intestines and cause total disability or death, to his general damage in the sum of ten thousand dollars." Special damages are then alleged: \$600 because of his inability to work at his trade of painter and decorator; \$200 for medical and surgical treatments.

The cause was heard by the court sitting without a jury, who found that the buttermilk was purchased, as alleged; that "in the buttermilk in said bottle there was a sharp piece of broken glass, which was not any part of the bottle, and that plaintiff got the same into his mouth in the course of drinking said buttermilk directly from said bottle, and cut his mouth thereby * * * that said buttermilk was not fit for human consumption, and that plaintiff relied upon the skill and judgment of defendant Safeway Stores, Inc., that the said bottle of iced buttermilk was fit for human consumption. * * * that other than the cut in the mouth caused by said broken glass plaintiff received no other injury nor any loss of weight; that plaintiff was treated by physicians and a reasonable value of such treatment did not exceed \$50.00."

Judgment was thereafter entered "that plaintiff take nothing by reason of his complaint against the defendant Lucerne Cream and Butter Company * * * that plaintiff have judgment against defendant Safeway Stores, Inc., a corporation, in the sum of One hundred dollars (\$100.00)."

Plaintiff appeals from the judgment on the grounds (1) that the evidence does not support the amount of the judgment and the amount thereof is grossly inadequate to compensate him for loss due to decreased earning capacity and the reasonable value of necessary medical services; (2) that the court failed to find upon a material issue raised by the pleadings, to-wit, the issue of special damages due to decreased earning power, upon which competent substantial evidence was introduced to support a finding in favor of appellant, all of which resulted in prejudice to appellant; (3) that the judgment should be reversed and the cause remanded for a new trial.

There is ample evidence in the record to support the trial court's finding that the buttermilk contained a piece of glass, that plaintiff got the same into his mouth in the course of drinking said buttermilk directly from the bottle and cut his mouth thereby. There is a conflict in the evidence as to whether or not appellant swallowed any glass and thereby suffered internal injuries. The testimony of two of the doctors who examined appellant discloses that there was an area of tenderness over the abdomen and the colon and a passing of blood by appellant, but the testimony of two other doctors was that they found no indication that appellant swallowed any glass. With such direct evidence establishing a cut in his mouth and with conflicting evidence as to whether or not appellant suffered any internal injuries, the court made its further finding that "other than the cut in the mouth caused by said broken glass, plaintiff received no other injury nor any loss of weight."

[1,2] "In considering an attack upon a verdict as inadequate or excessive, the appellate court must treat every conflict in the evidence as resolved in favor of the respondent and must give him the benefit of every inference that can be reasonably drawn in support of his claim." 8 Cal.Jur. 837; *Sites v. Howrey*, 108 Cal.App. 348, 353, 291 P. 597. Since the court found from the evidence adduced that appellant received no injury other than the cut in his mouth, it cannot be held that the judgment is inadequate to compensate appellant for such injury.

[3,4] With respect to the second point here raised, since it is the judgment of the court that appellant received no injury other than the said cut in his mouth, any finding which the court might have made with reference to loss of time and decreased earning power would necessarily have been adverse to appellant, therefore the failure to make such finding does not constitute reversible error. As was stated in the case of *Brown v. Schroeder*, 88 Cal.App. 192, at page 201, 263 P. 325, 328:

"It is not always necessary to make a specific finding as to each of several material issues where the findings taken as a whole, or construed together, clearly show that they include the court's conclusion upon all the material issues. *Rossi v. Beau-lieu Vineyard*, 20 Cal.App. 770, 130 P. 201.

[5] "If in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may, and will be, disregarded. *American National Bank v. Donnellan*, 170 Cal. 9, 15, 148 P. 188, Ann.Cas. 1917C, 744; *Thayer v. Tyler*, 169 Cal. 671, 147 P. 979. * * * From the facts found and from the judgment ordered it is evident, in the light of the entire record, that, if more complete findings had been made, they would have been adverse to the contentions of appellant. If that be so, the failure to find further is not ground for reversal of the judgment. *Krasky v. Wollpert*, 134 Cal. 338, 66 P. 309."

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 213
PEOPLE v. BURLEY.
 Cr. 3087.

District Court of Appeal, Second District,
 Division 1, California.
 May 2, 1938.

1. Burglary ☞4

A "house" in the sense of burglary statute is any structure which has walls on all sides and is covered by a roof. Pen. Code, § 459.

[Ed. Note.—For other definitions of "House," see Words & Phrases.]

2. Burglary ☞4

A popcorn stand which measured eight feet by ten feet and was a little over seven feet in height and was made of welded steel plates, consisting of floor, four walls, and roof and containing a door and windows and mounted on small wheels was a "store" and a "building" within meaning of burglary statute, notwithstanding it was not permanently affixed to realty. Pen.Code, § 459.

[Ed. Note.—For other definitions of “Building” and “Store,” see Words & Phrases.]

3. Criminal law — 1023(10)

Appeal does not lie from sentence.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John L. Burley was convicted of burglary of the second degree, and he appeals from the judgment and sentence.

Affirmed. Appeal from sentence dismissed.

John E. Glover and Richard H. Cantillon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an information with the crime of burglary, was adjudged guilty of burglary of the second degree by the court. The appeal herein is from the judgment and sentence and from an order denying a motion for a new trial.

Defendant was accused of entering the store and building of one William Field. The evidence reveals that the store building was a comparatively small structure wherein the owner engaged in the business of selling popcorn, candy, cigarettes, and the like. The aforesaid structure was mounted on small wheels approximately 4 to 8 inches in diameter and was located on a lot adjoining a theater in Huntington Park. It measured 8 feet by 10 feet, was a little over 7 feet in height, and was made of welded steel plates, consisting of floor, four walls, and roof. It was entirely inclosed, and contained a door and two windows. The stand or store had been located continuously at the same place for approximately five months, and a monthly rental was paid for the space.

Appellant's sole contention on appeal is, “that the said popcorn stand does not constitute a building or structure,” and therefore does not come within the terms of section 459 of the Penal Code, which defines burglary as follows:

“Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof,

with intent to commit grand or petit larceny or any felony is guilty of burglary.”

It is urged that the trial court apparently relied upon the authority of *People v. Coffee*, 52 Cal.App. 118, 198 P. 213, 214, which authority, appellant argues, furnishes no support for respondent's contention that the building in question meets the requirements of section 459 above quoted. In that connection appellant contends that a building or structure, to come within the meaning of the definition of burglary, unless it is a railroad car, must be permanently affixed to the realty.

[1] The *Coffee Case*, supra, as well as the authorities cited therein, would appear to refute appellant's argument. Moreover, a house, in the sense of the statute in question herein, is held to be “any structure which has walls on all sides and is covered by a roof” (*People v. Buyle*, Cal.App., 70 P.2d 955; *People v. Franco*, 79 Cal.App. 682, 250 P. 698; *People v. Jackson*, 131 Cal.App. 605, 21 P.2d 968), and a building could well be described in the same manner.

In the state of Montana, under a statute substantially the same as the California statute, the defendant's conviction of burglary was upheld where it was charged and established that defendant had unlawfully entered a “sheep wagon.” As the court therein observed, “Here we have a * * * structure, erected for the purpose of habitation and the housing of the goods and chattels of the sheep herder, inclosed within four walls and roofed over and meets all the requirements of the definitions given of a ‘building.’” The court further observed, “To hold that the verdict and judgment should be set aside because the house entered was set on wheels would be extremely technical, and on this phase of the case we quote with approval the following from *State v. Bishop*, 51 Vt. 287, 31 Am.Rep. 690, ‘Names change often with the habits and customs of the people; it is not so important to determine the name, as the thing, wherein burglary, by the statute, may be committed. That subtle astuteness that would discover a difference where none exists, and would find a way of escape * * * through narrow crevices of the law, serves no useful purpose. When one is charged with crime in plain language, and convicted by honest men upon legal evidence, it is better that he work out the penalty to the relief of the

public and the safety of the State." State v. Ebel, 92 Mont. 413, 15 P.2d 233, 235.

[2] Obviously, the statutory offense of burglary in California is much more comprehensive than the offense at common law, and there are no words in the statute to indicate a legislative intent to limit such offense to the unlawful entry of structures that are a part of the realty. It should be noted that "tent, vessel and railroad car" are included in the definition, in which connection a "tent" can scarcely be regarded as being permanently affixed to the realty. It would appear from the foregoing, therefore, that the judgment of the trial court which, in effect, recognizes the structure in question as being a store and building within the meaning of the definition of burglary is supported by the evidence.

[3] For the foregoing reasons, the judgment and order appealed from are affirmed. As no appeal lies from the sentence, the attempted appeal therefrom is dismissed.

We concur: YORK, P. J.; WHITE, J.



26 Cal.App.2d 219

PEOPLE v. REYNOLDS.

Cr. 3079.

District Court of Appeal, Second District,
Division 1, California.

May 3, 1938.

1. Criminal law ☞507(7)

A complaining witness in prosecution for violation of sex perversion statute was an "accomplice," although slightly under 14 years old, since he possessed a knowledge of right and wrong and of wrongfulness of offense charged. Pen.Code, § 26, subd. 1; § 288a.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

2. Criminal law ☞369(1)

In prosecution for violation of sex perversion statute, evidence of similar acts tending to prove lewd and lascivious dis-

position of defendant was admissible to corroborate the specific charge. Pen.Code, § 288a.

3. Criminal law ☞511(2)

A conviction of violation of sex perversion statute based on an accomplice's testimony was unauthorized, where corroborative evidence only showed defendant's lewd and lascivious disposition and did not connect him with the offense charged or show the commission of offense or circumstances thereof as required by statute. Pen.Code, §§ 288a, 1111.

4. Criminal law ☞511(1)

More than mere suspicion is required by way of corroboration of an accomplice's testimony. Pen.Code, § 1111.

5. Criminal law ☞510

The statute requiring evidence corroborating an accomplice's testimony to sustain a conviction is mandatory. Pen.Code, § 1111.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Ernest H. Reynolds was convicted of three violations of section 288a of the Penal Code and one of section 288, as amended by St.1933, p. 1028, and he appeals.

Affirmed except as to one violation of section 288a, wherein judgment was reversed and the cause remanded.

Donald MacKay and S. W. Thompson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an indictment returned by the grand jury of Los Angeles county, defendant was accused of three violations of section 288a of the Penal Code and one violation of section 288 of the same Code, as amended by St.1933, p. 1028. Counts I and II of the indictment charged violations of section 288a of the Penal Code on the 28th day of September, 1937, while counts III and IV involved respectively violations of sections 288a and 288 of the Penal Code on the 1st day of May, 1937. At the time of the commission of the offenses charged as having been committed on September 28, the complaining witness was fourteen years of age, while on the date charged in counts III and IV he was thirteen years old.

After trial before a jury, guilty verdicts were returned on all counts. From the several judgments pronounced against him and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Appellant does not challenge the correctness of the convictions had upon counts I, II, and IV, thereby conceding the sufficiency of the evidence to sustain such convictions; and his sole contention is that as to count III the complaining witness was an accomplice within the meaning of section 1111 of the Penal Code, and that his testimony in relation to the offense charged in count III was not corroborated by such other evidence as tended to connect appellant with its commission.

[1] It is conceded that the complaining witness, although slightly under the age of fourteen years, was nevertheless an accomplice, for the reason that he was possessed of knowledge of right and wrong and at the time of the commission of the offense charged in count III he knew its wrongfulness, subdivision 1, section 26, Pen.Code; and the Attorney General in his brief with reference to count III says: "The only direct evidence establishing the commission of this offense was the testimony of the complaining witness."

That this case was tried upon the theory that the boy was an accomplice there can be no doubt. The learned trial judge of the superior court properly instructed the jury upon the necessary corroboration of an accomplice which would justify a conviction. We are convinced that this course was the proper one, because taking the testimony of the complaining witness as true, in connection with count III he was undoubtedly an accomplice (*People v. McCollum*, 214 Cal. 601, 602, 7 P.2d 301; *People v. Robbins*, 171 Cal. 466, 472, 154 P. 317); and in fairness to the trial judge, it should be said that reference by us to the transcript indicates that the question of the sufficiency of the corroborative evidence as to count III was not presented on the motion for a new trial.

[2-4] Respondent, however, seeks to justify the conviction on count III for the reason that there was corroborative evidence of the lewd and lascivious acts which formed the basis of the charges contained in counts I, II, and IV of the indictment, and which evidence of acts similar to the one charged in count III tended to prove a lewd and lascivious disposition and ten-

dency upon the part of appellant. The Attorney General argues that the establishment of such perverted tendencies upon the part of appellant supplies the corroboration necessary to warrant a conviction upon the specific charge contained in count III; citing in support thereof *People v. Troutman*, 187 Cal. 313, 201 P. 928. This case, however, is not in point, because it involved a prosecution for violation of section 288 of the Penal Code in which the complaining witness was not, as in the instant case, an accomplice. While it is true that evidence of similar acts tending to prove a lewd and lascivious disposition and the tendency of the defendant to commit lewd and lascivious acts is admissible, and would be corroborative of the specific charge, still the question before us is whether it is sufficient corroboration when the only other testimony in the record consists of that given by an accomplice.

The corroborative evidence relied upon by respondent in the instant case as to count III thereof falls far short of the legal requirements to constitute corroboration (*People v. Kempley*, 205 Cal. 441, 461, 271 P. 478; *People v. Davis*, 210 Cal. 540, 554, 555, 556, 293 P. 32), because the law requires that such testimony offered in corroboration of the testimony of an accomplice shall of *itself* tend to connect the defendant with the offense charged; and the claimed corroborative evidence as to count III does not even show "the commission of the offense or the circumstances thereof" within the rule laid down in section 1111 of the Penal Code. Regardless of how the claimed corroborative evidence be viewed, nevertheless, in order to give it effect even as tending in that direction it is necessary at every point to interpret and explain this "corroboration" in the light of the testimony of the accomplice. It requires the testimony of the accomplice to give it direction to the alleged crime before it can be said to connect the defendant with the commission of that crime. Not even the corpus delicti of the offense charged in count III can be established without reference to the testimony of the accomplice. Even though it be assumed that the corroborative evidence arouses a suspicion of defendant's guilt, still it is firmly established in our law that more than mere suspicion is required by way of corroboration. *People v. Yeager*, 194 Cal. 452, 473, 229 P. 40; *People v. Kelly*, 69 Cal.App. 558, 570, 231 P. 767; *People v. Taylor*, 70 Cal.App. 239, 244, 232

P. 998; *People v. Jones*, 87 Cal.App. 482, 262 P. 361; *People v. Robbins*, supra, 171 Cal. 466, at page 470, 154 P. 317; *People v. Kempley*, supra, 205 Cal. 441, at page 456, 271 P. 478; 8 Cal.Jur. 178.

[5] Section 1111 of the Penal Code is mandatory (*People v. Allison*, 200 Cal. 404, 253 P. 318); and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. "The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the state's case depends solely upon his uncorroborated testimony." *People v. Robbins*, supra, 171 Cal. 466, 469, 154 P. 317, 318. When, as here, the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. *People v. Viets*, 79 Cal.App. 576, 587, 250 P. 588.

For the foregoing reasons, the judgment and order denying the motion for a new trial as to count III are reversed and the cause remanded for a new trial as to that count only. The judgments entered on counts I, II, and IV are, and each of them is, affirmed, and the order denying the motion for a new trial as to said counts I, II, and IV is affirmed.

We concur: YORK, P. J.; DORAN, J.



26 Cal.App.2d 167

WYLIE v. WYLIE.

Civ. 5813.

District Court of Appeal, Third District,
California.

April 27, 1938.

Rehearing Denied May 27, 1938.

Hearing Denied by Supreme Court

June 24, 1938.

1. Divorce ⇐245(4)

An order modifying an award of alimony which had been allowed in accordance with property settlement agreement from which no appeal was taken was final, subject only to future modification on proper show-

ing of changed conditions of respective parties, unless court was without jurisdiction to enter order of modification. Civ.Code, § 139.

2. Divorce ⇐245(1)

Where contract between husband and wife settling property rights did not provide for a final definite award of alimony but limited requirement for husband to pay wife \$60 per month until such time as wife married again or secured permanent employment, court had jurisdiction to determine motion to modify or annul order, and hence an order modifying amount of alimony which was regularly made on proper proceedings was erroneously set aside on wife's motion. Civ. Code, § 139.

3. Divorce ⇐245(4)

An abuse of discretion by reduction of amount of alimony previously awarded pursuant to property settlement agreement between parties by reducing amount of alimony on insufficient evidence or in absence of testimony could be reached only on appeal from order reducing alimony. Civ.Code, § 139.

4. Divorce ⇐245(1)

An order allowing alimony for support of wife may be modified in absence of contract between parties to the contrary. Civ. Code, § 139.

5. Divorce ⇐245(1)

The court is without jurisdiction to subsequently modify or annul award of alimony contrary to terms of contract settling property rights between parties pursuant to which award was entered and which specifically provides for unconditional payment of alimony for support of wife.

6. Divorce ⇐245(1)

A court is authorized to modify or annul an award of alimony to conform to express terms of contract between parties which is approved and made part of decree of divorce. Civ.Code, § 139.

Appeal from Superior Court, Modoc County; Albert F. Ross, Judge.

Divorce action by A. K. Wylie against Violet O. Wylie. From an order vacating a previous order which modified an award of alimony, the plaintiff appeals.

Reversed, with directions.

Hearing denied by Supreme Court; CURTIS and SEAWELL, JJ., dissenting.

A. K. Wylie and Charles Lederer, both of Alturas, and Herbert P. Welch, of Lakeview, Or., for appellant.

Carter, Barrett, Finley & Carlton, of Redding, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from an order of court vacating a previous order which modified an award of alimony in a divorce proceeding. The alimony was allowed in accordance with an agreement settling property rights which was incorporated in the final decree of divorce. The order modifying the previous award of alimony was annulled on the theory that the court lacked jurisdiction to vary the terms of a contract settling property rights which was approved and became a part of the decree of divorce. But the contract for alimony was merely conditional.

The plaintiff and defendant were formerly husband and wife. Dissensions arose between them. A divorce was contemplated. With that in view, they executed a written agreement settling their property rights. It disposed of all their property in a manner which is not here involved or criticized except with relation to one paragraph which provides for the payment of alimony in the following language: "The said A. K. Wylie * * * will pay to Mrs. A. K. Wylie \$60.00 per month until such time as she marries again or secures permanent employment and becomes and remains permanently self-supporting."

[1] A complaint for divorce was subsequently filed by the plaintiff against his wife on the ground of willful desertion. The defendant appeared by counsel and denied the material allegations of the complaint. The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the plaintiff. The written agreement settling property rights, which was attached to the complaint as an exhibit thereof, was also approved by the court. An interlocutory decree of divorce was rendered in favor of the plaintiff. It also approved the agreement settling property rights, and distributed the property in accordance therewith. September 3, 1931, the final decree of divorce was entered. It incorporated in its provisions the agreement settling property rights, and recited that its provisions had been fully complied

with to that date. The plaintiff fulfilled all the provisions of the agreement, paying to the defendant \$60 per month, allowed as alimony, until May 5, 1935. On the last-mentioned date he filed in that court and cause a written notice of motion to modify and annul the provision of the contract and decree awarding the defendant \$60 per month as alimony. An order was thereupon issued and served on the defendant to show cause at a specified time and place why that alimony clause should not be modified and annulled. The motion was heard by Judge Jamison on June 4, 1935, both parties being present in court, and adducing evidence in their own behalf. The court thereupon entered an order modifying the alimony clause above quoted by reducing the amount to be paid the defendant after July 1, 1935, to \$30 per month. No appeal was taken from that order. Unless the court was without jurisdiction to make that order, it became final, subject only to future modification upon a proper showing of a change of conditions of the respective parties.

July 22, 1936, the defendant filed in that proceeding her motion to vacate the former order modifying the award of alimony on the ground that the court was without jurisdiction to make it. Upon citation for plaintiff to show cause, that motion was heard by another judge and granted. The court then ordered that the former order modifying the award of alimony be annulled. From this final order an appeal was perfected.

The only question presented on this appeal is whether, under the circumstances of this case, the court was without jurisdiction to modify the original award of alimony.

[2, 3] Since the contract settling property rights did not provide for a final, definite award of alimony, but, on the contrary, by its very terms limited the requirement for the plaintiff to pay defendant \$60 per month until such time as she marries again or secures permanent employment, the court unquestionably had jurisdiction to hear and determine a motion to modify or annul that order. Certainly, upon a showing that the defendant had remarried, or that she was self-supporting, under the express terms of the contract the award of alimony should be terminated. The language of the contract which was adopted by the

court expressly confers jurisdiction to modify or annul it under specified circumstances. The contract for alimony was merely conditional. Since the court had jurisdiction to hear and determine a motion to modify or annul the award of alimony, the order which was regularly made upon proper proceedings therefor was erroneously set aside. The record discloses the fact that evidence was adduced by the respective parties on that motion to modify the award. This record fails to show what evidence was then submitted. It will not be controverted that, if the evidence showed that the defendant had remarried, the court would have been authorized by the terms of the contract to terminate the allowance of alimony. If the evidence showed the defendant to be self-supporting, the court was authorized to cancel the allowance. If the court had the authority to cancel the award because the defendant had become self-supporting, it also had the power, under such circumstances, in its discretion, to modify it by reducing the payments one-half. If the court abused its discretion by reducing the amount of alimony to be paid upon insufficient evidence, or an absence of testimony, that abuse could be reached only upon appeal from the previous order. No such appeal was taken.

[4] In the absence of a contract between the parties to the contrary, an order of court allowing alimony for the support of a wife may be modified. Section 139, Civ. Code.

[5,6] It is true that, where an innocent husband is awarded a decree of divorce which approves and adopts a previous written agreement settling property rights between them, and specifically providing for unconditional payments of alimony for the support of the wife, the court is without jurisdiction or authority to subsequently modify or annul the award contrary to the terms of the contract. *Johnson v. Johnson*, 104 Cal.App. 283, 285 P. 902; *Parker v. Parker*, 55 Cal. App. 458, 203 P. 420; *Johnson v. Superior Court*, 128 Cal.App. 584, 17 P.2d 1055; 2 *Schouler on Marriage and Divorce*, 6th Ed. p. 1992, § 1829. A court, however, is authorized to modify or annul an award

of alimony to conform to the express terms of a contract between the parties which is approved and made a part of the decree of divorce. *Wilder v. Wilder*, 214 Cal. 783, 7 P.2d 1032, 1033. In the case last cited the wife was granted a decree of divorce and awarded an allowance of \$160 per month for her support in conformity with the provisions of a written agreement settling their property rights. That contract provided for the specific amount mentioned, subject to modification "by mutual consent of the parties, or by a court of competent jurisdiction." On a subsequent motion, like the situation in the present case, the allowance was modified. On appeal in that case it was contended that "the trial court was bound fast by the particular provisions of paragraph 8 of the property settlement agreement." The Supreme Court said: "This contention is based on the erroneous assumption that the cited paragraph of the contract between the parties is forever binding and obligatory upon them. This contention is clearly without merit, for the contract itself expressly provides, as indicated above, that a court of competent jurisdiction may modify the amount of the allowance therein fixed."

The only distinction between the preceding case and the one at bar is that the contract in the *Wilder Case* specifically allowed alimony to the wife in the sum of \$160 per month, subject to modification "by mutual consent of the parties, or by a court of competent jurisdiction." In the present case the contract allows alimony in the sum of \$60 per month "until such time as she marries again or secures permanent employment." The contract in this case expressly authorizes a modification or cancellation of the award of alimony under those circumstances. The trial court therefore had jurisdiction and authority to hear and determine the motion to cancel or modify the award of alimony.

The order vacating and annulling the previous order modifying the award of alimony is reversed, and the court is directed to enter an order denying that motion.

We concur: PULLEN, P. J.; PLUMMER, J.

26 Cal.App.2d 189

PEOPLE v. SMITH.
Cr. 1604.

District Court of Appeal, Third District,
California.

April 29, 1938.

1. Criminal law $\S$ 737(2)

Where evidence was conflicting, determination of venue of alleged offense of rape was for the jury. Pen.Code, $\S$ 261, subd. 3.

2. Criminal law $\S$ 1159(5)

The District Court of Appeal would not disturb a verdict on the question of venue of an offense of rape, where the evidence was conflicting. Pen.Code, $\S$ 261, subd. 3.

3. Criminal law $\S$ 564(1)

Evidence that offense of rape was committed in county in which accused was being prosecuted sufficiently showed venue of offense to sustain conviction. Pen.Code, $\S$ 261, subd. 3.

4. Criminal law $\S$ 1169(11)

Where accused in prosecution for rape admitted illicit relations with prosecuting witness, but claimed there was no force or violence used at the time of the attack, admission of testimony referring to other acts showing lascivious conduct with other women was not prejudicial. Pen.Code, $\S$ 261, subd. 3; Const. art. 6, $\S$ 4 $\frac{1}{2}$.

5. Rape $\S$ 57(3)

Where accused in prosecution for rape admitted illicit relations with prosecuting witness, only question left for jury was whether act was accomplished with force and violence, or whether it was voluntary on part of prosecuting witness. Pen.Code $\S$ 261, subd. 3.

6. Criminal law $\S$ 1037(1)

Where no objection was urged or taken by accused to alleged prejudicial remarks by prosecuting attorney in argument, no question was raised for review.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Robert Duane Smith was convicted of an offense based upon subdivision 3 of section 261 of the Penal Code, and he appeals.

Affirmed.

DeCastle & Devoto, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER, delivered the opinion of the court.

The defendant was indicted and tried for an offense based upon subdivision 3 of section 261 of the Penal Code. The trial resulted in conviction. From the denial of the defendant's motion for a new trial, and the judgment based upon the verdict, the defendant appeals.

A great number of reasons are assigned by the appellant as to why the judgment should be reversed. All of these reasons we have considered, but most of them are of such a minor importance as not to require consideration in this opinion.

[1,2] The principal reasons assigned for reversal are as follows: The alleged failure of the prosecution to prove the venue of the offense charged; the admission of the testimony over the defendant's objection of the witness, Miss Blessman; prejudicial conduct on the part of the district attorney in his argument to the jury; and errors by the court in instructing the jury. The further objection is presented that the court erred in denying the appellant's motion for a directed verdict and requiring the defendant to introduce testimony as to the venue of the offense. While this contention is strenuously urged, it appears to us to be absolutely without merit. If, as contended for by the appellant, the prosecution had failed to introduce testimony from which the jury could find that the offense was committed in the county of Sonoma, as alleged in the indictment, the defendant could have rested without introducing any testimony whatever upon that subject. That he introduced testimony tending to controvert the testimony of the prosecution, was a purely voluntary act on his part, and of course created only a conflict in the testimony, which presented, first, a question for the jury, and, if there is sufficient testimony in the record upon which the jury might reach a conclusion that the offense was committed in the county of Sonoma, the verdict cannot be disturbed on the question of venue.

Before setting forth the testimony of the prosecuting witness as to the place where the offense was committed, we may refer to the testimony of the witness Moodey, who located the situation of a certain reflectorized sign, identified by the

prosecuting witness and by Moodey testified to be about 3.9 miles within the boundary line of the county of Sonoma, and that, from this reflectorized sign, Mission Inn, the place where the prosecuting witness was temporarily staying, was a distance of some 4.1 miles. The testimony of the prosecuting witness states that the attack was made in a certain pasture to which the defendant had driven the automobile in which they were riding, and that this reflectorized sign, which, by the way, is a three-way sign pointing to San Francisco, Santa Rosa, and Sonoma, was observed by her very shortly after the attack; that after the attack, on the way back toward Mission Inn, she asked the defendant for a drink of water, to which he replied that it would only be 5 minutes until they reached the Mission Inn.

On cross-examination the prosecuting witness limited the time between the second attack and their arrival at the Mission Inn as being from 20 minutes to a half hour. It is evident that after the attack some little time elapsed before the defendant and the prosecuting witness were prepared to start back toward the Mission Inn, and having approximately eight miles to travel, furnishes a basis for the jury to conclude that the pasture referred to was within the boundary lines of the county of Sonoma. The record does not show, so far as we have been able to discover, nor have we been cited to any portion of the transcript, indicating that any effort was made either by the prosecution or the defense to locate the pasture.

Considerable portion of the testimony relates to the movement of the defendant and the prosecuting witness on the evening of August 20, 1937. It appears that they left the Mission Inn some time in the evening of that day and visited a large number of roadhouses and bars, and partook quite liberally of intoxicating liquors. The testimony would indicate that they also visited Santa Rosa and Napa. The prosecuting witness testified that she thought the last place they visited was a barroom in Santa Rosa. The defendant testified that the last place they visited was in Napa, which place they left at about 2 o'clock, and drove around over different highways for a considerable length of time preceding the attack; that in driving around he took the wrong road and followed the highway leading to Vallejo; and that the attack occurred

in a pasture not far from the road leading to Vallejo in the county of Napa.

It also appears from the testimony in the record that the appellant, preceding the attack, had consumed, as we have said, a great many drinks of intoxicating liquor, and at least a sufficient number to inflame his passions and render his statements of what took place on the night of August 20th and the morning of August 21, 1937, decidedly uncertain as to its correctness.

The prosecuting witness in her testimony stated that in drinking with the appellant she drank ten small Martinis, two drinks of champagne, and an after-dinner drink, the name of which she did not recall. The defendant not only drank with the prosecuting witness, but the testimony shows that he also drank with others.

The testimony, in addition to what we have stated, given by Miss Nichols, the prosecuting witness, upon which the prosecution relies to establish venue, is as follows:

"Q. Now Miss Nichols, where did you go after leaving this place in Santa Rosa? A. I can't recall in which direction we left Santa Rosa, on which road we left, but we started to what I thought was toward home.

"Q. Now, did you continue to drive with Mr. Smith? A. We drove around several different roads, turns and twists.

"Q. Did you recognize any of them? A. No, I didn't recognize anything like the road that we came out on. I know it wasn't the same roadway we came out on.

"Q. You mean the road you came in to Santa Rosa, you mean? A. Yes.

"Q. How long did you continue to drive? A. It seems to me hours, but I guess we drove about an hour. He turned to the left into a pasture and came to a stop.

"Q. And what did he do with reference to the car? Now, Miss Nichols, to where did you proceed from that point? A. We turned out of the pasture, we come about a half a block and I saw a house at the side of the road.

"Q. Did you do anything at that point? A. I said, 'Please get me a drink of water, please get me a drink of water.' I felt very faint and was afraid I would lose consciousness. I did not know what he was doing; at the time we were at the house, I thought he stopped the car

to get me a drink of water. He said, 'Sure, I will get you a drink of water.'

"Mr. DeCastle: What did you say? A. He said, 'Sure, I will get you a drink of water.'

"Mr. McGettigan: Q. Did he stop the car? A. Yes.

"Q. Now, then, what took place after that, Miss Nichols? A. When we left the spot I said, 'You are not going to get me a drink of water?' He said, 'It will be only five minutes until you arrive home and you can get it then.'

"Mr. DeCastle: What was that? (Reporter reads last answer.)

"Mr. McGettigan: Q. At what point did you stop with reference to the point where he said, 'It will be only five minutes until you arrive home? A. From the point, it was not very far until I saw a sign pointing to San Francisco; I thought again he wouldn't take me home, and I thought he would take me some place and get rid of me.

"Q. You saw a sign indicating San Francisco, is that correct? A. Yes, I did.

"Q. And have you since seen that sign, Miss Nichols? A. Yes.

"Q. And when did you see it last? A. Saturday morning.

"Q. The sign you saw Saturday morning was the sign you recall seeing on the morning of August 21, 1937? A. Yes.

"Q. And that sign is situated in Sonoma County, Miss Nichols? A. Yes, as far as I know the County, it is.

"Q. Miss Nichols, are you able to state approximately how long it took you to arrive at the Sonoma Mission Inn on this morning of August 21, 1937, from the time you observed this San Francisco sign? A. It seemed like a long time; I think it was about a half hour.

"Q. Do you know what road you came in on? A. I recognized the Standard Oil station on the road coming from Sonoma to the Inn; I knew that I was going home then.

"Q. That is the landmark that you recognized, that is correct? A. Yes."

Mr. DeCastle then questioned Miss Nichols on cross-examination as follows:

"Q. I see. Now, when you then started back, left this place and started back, how long a time did you drive before Mr. Smith stopped? A. It seemed about an hour.

"Q. About an hour? A. Yes.

"Q. In what manner was Mr. Smith driving; was he driving fast or just going along talking, visiting? A. He was driving, I should say, thirty-five miles an hour.

"Q. And was it from that time that you left this place until you stopped after this drive that you noticed this sign, 'To San Francisco'? A. No, I didn't notice the sign, 'To San Francisco', then. It was after the second attack when I saw the sign.

"Q. And then where did you go? A. We drove a very few minutes and got near a house there and I asked him to get me a drink of water. I felt very faint and thought I wouldn't last.

"Q. You continued driving through the pasture? A. No, we continued on the same road. We turned to the left out on the road from the pasture, but he didn't go back.

"The Court: But he did turn around in the pasture and go out on the highway again? A. Yes.

"Mr. DeCastle: Q. When he stopped, how long would you say it was from the time you got in the car in the pasture until you stopped by this house and asked for a drink? A. A few minutes.

"The Court: A few minutes.

"Mr. DeCastle: How long? A. Oh, it might have been five, ten or fifteen minutes.

"Q. Could it have been five minutes? A. It could have been.

"Q. Could it have been three minutes? A. No, more than that.

"Q. Was it any more than five minutes? A. I don't know; at a time like that, time doesn't mean a great deal.

"Q. And that was the second? A. That was the second attack.

"Q. Now, when you left there, where did you go? A. We drove away until I saw a sign, 'To San Francisco', and he took another road; I didn't know where I was until I came to the Standard Oil Station, and I recognized that as a landmark going to Sonoma City; I had been by there.

"Q. Now, Miss Nichols, how long did you say you drove after leaving this place where the boy sang, until Mr. Smith stopped the car? A. It must have been an hour we drove around on the road.

"Q. You think about an hour? A. Yes.

"Q. What is your best recollection of the interval of time elapsing from the time Mr. Smith stopped the car in the pasture and made the attack you described, and the time you next described? A. It is hard to say, it might be five, ten or fifteen minutes.

"Q. Could it have been longer than that? A. It might have been.

"Q. Have you any definite recollection on that, Miss Nichols? A. No, I haven't.

"Q. It was prior—withdraw the question. And have you any definite recollection, or any recollection as to the amount of time elapsing between the second attack until you arrived at the Sonoma Mission Inn? A. It seemed twenty minutes or half an hour."

The fact that the appellant testified directly contrary to the testimony given by Miss Nichols, and introduced testimony indicating that the last place they left was the city of Napa, instead of Santa Rosa, raised only a conflict, which, of course, presented a question for determination by the jury, and not by this court.

[3] Being of the opinion that what we have here set forth is sufficient to sustain the finding of the jury that the offense was committed in the county of Sonoma, the appellant's contention that it was committed elsewhere must be disregarded.

[4,5] It appears from the record that prior to the trial a witness by the name of Miss Blessman, who was acquainted with the appellant, had a conversation with him relative to the offense for which he was about to be tried, and in that conversation reference was made to certain lascivious acts and illicit conduct by the defendant with a certain other woman, and in that conversation Miss Blessman also stated to the defendant, in substance, that he knew he had committed the act with which he was charged, to which the appellant replied that he ought not to be sent to the "Pen" for such an act. It also appears in the record that Miss Blessman reproved the appellant somewhat for his conduct, and called him a sadist.

It is strongly urged by the appellant that the admission of this testimony, which referred to other acts, was erroneous and prejudicial to the defendant. That references to other acts showing lascivious conduct with other women is not generally admissible, is sustained by practically all of the authorities, and under most circum-

stances the admission of such testimony is held prejudicial. In the instant case that rule does not apply. The defendant himself went on the witness stand, related all the visits made by him and Miss Nichols on the evening of August 20, 1937, and the early morning of August 21, 1937, and his driving around until he reached the pasture which we have heretofore mentioned, and there by his testimony he tells the whole sordid story of his illicit relations with the prosecuting witness, attempting to exculpate himself by claiming that there was no force or violence used at the time of the attack. Having so related the occurrences to the jury, the admission of Miss Blessman's testimony of other lascivious conduct entirely loses its prejudicial character by the testimony of the defendant himself. Only one question in relation thereto was left to the jury: Whether the act was accomplished by force and violence, or whether it was voluntary on the part of the prosecuting witness. That this testimony in that respect does not bear the impress of truthfulness is established by the testimony of Dr. Andrews, who examined the prosecuting witness about 8 o'clock on the morning of August 21, 1937, and found a number of bruises upon her face, bruises upon her arms, and bruises upon her hands. We may here state that the prosecuting witness in her testimony recounted the fact of the defendant having slapped her on the face a great many times, and that she resisted to the utmost.

As bearing upon this question of resistance, we may state that Miss Nichols gave her weight as 118 pounds; the defendant testified that he was exactly 6 feet tall and weighed 215 pounds. The physical contrast needs no comment on our part.

No prejudicial error having been suffered by the appellant by reason of the error of the court in admitting Miss Blessman's testimony to which we have referred, it follows that, under section 4½ of article 6 of the Constitution, reversal cannot be had by reason of the admission of such testimony.

[6] In examining the record we find that no objection was urged or taken by the appellant to the alleged prejudicial remarks made by the district attorney in his argument to the jury. Hence, it is unnecessary for us to express any opinion in relation thereto.

It is finally urged that the court misdirected the jury.

The instructions are quite lengthy; we have read them carefully, and we find nothing therein prejudicial to the appellant. We may further add that it appears from a reading of the instructions that the jury was very fully and carefully informed as to the law applicable to the case under consideration.

Being of the opinion that the appellant had a fair trial and was justly convicted, it follows that the order and judgment of the trial court should be and they are hereby affirmed.

We concur: PULLEN, P.J.; THOMPSON, J.



26 Cal.App.2d 153

BABB v. MURRAY.

Civ. 10716.

District Court of Appeal, First District,
Division 2, California.

April 27, 1938.

1. Damages ⇐184

To recover, under statute, for detriment certain to result in the future, party must prove such a degree of probability of the injuries occurring as amounts to reasonable certainty that they will result from original injury. Civ.Code, § 3283.

2. Damages ⇐131(2)

\$7,500 for injuries to 3½ months old child who suffered fracture of both femurs, was hospitalized for 5 weeks, could not be given an anesthetic, and was required to have bones reset by fastening of weights to feet, but who suffered no permanent injuries, and was normal at the age of 10 months, was "excessive" by \$3,500, where evidence showed that verdict was prompted by prejudice raised against defendant. Civ. Code, §§ 3283, 3333.

[Ed. Note.—For other definitions of "Excessive," see Words & Phrases.]

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Nadine Babb, a minor, by and through her guardian ad litem, Keith D.

Babb, against J. H. Murray for injuries sustained in a collision between two automobiles. From a judgment for plaintiff, defendant appeals.

Affirmed on remittitur.

Charles V. Barfield, of San Francisco, and F. E. Hoffmann, of San Mateo, for appellant.

Francis N. Foley, of San Mateo, for respondent.

NOURSE, Presiding Justice.

In an action for personal injuries brought by a three and one-half months old child through her guardian, the jury returned a verdict for \$7,500. Judgment was entered on the verdict, and the defendant has appealed on the single ground that the award is excessive.

The evidence of the injuries suffered by the child is not in conflict. She was riding in an automobile with her father and mother when the car collided with one operated by the defendant. At the time of the collision the child was being held on the lap of the mother; she was thrown forward against some part of the automobile causing a fracture of both femurs. She was taken to a hospital, where she remained for five weeks under a physician's care. This physician testified that, because of her age, he was unable to give the child an anesthetic, and was afraid to reset the bones by manipulation. He strapped her to a crib and fastened weights to each foot, by which process he pulled the bones of the legs into position. At the time of the trial the child was ten months old. The physician attending her testified that there was then some slight appearance of deformity where the bones had knit, but that this would disappear in four or five years. Both legs were slightly shorter than normal, but both were of equal length. He could not say that this shortening would be a permanent condition. The father and the mother of the child, and the physician called by them, testified that the child had made a complete recovery, was "all right," and perfectly normal at the age of ten months. Evidence was offered that the physician intended to charge \$300 for his services, but the record does not disclose what expenses were incurred by the parents for hospitalization of the plaintiff or what they recovered as special damages.

Bearing directly on the question of the excessiveness of the verdict is the evidence tending to show that the defendant was

intoxicated; that the mother of the child was so seriously injured in the collision that she was unable to be with her daughter during the treatment in the hospital; that the father was also injured; that the defendant was arrested on the night of the collision and taken from the hospital to the county jail; and that he was driving with a woman who was not his wife and who was killed in the collision. Though much of this evidence was controverted, the plaintiff laid undue stress upon her version of it for the obvious purpose of inflaming the minds of the jury against the defendant. We do not say that any of this evidence was improperly admitted; we refer to it, and to the emphasis put on it, to show the atmosphere under which the jury was asked to evaluate the monetary damages suffered by the plaintiff.

An "excessive" verdict has been held to be one which appears to be the result of "passion and prejudice." In *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 144, 57 P. 774, 775, the court said: "To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial."

[1] Section 3333 of the Civil Code declares the measure of damages in cases of this kind to be "the amount which will compensate for all the detriment proximately caused thereby." Section 3283 of the Civil Code permits an award for detriment "certain to result in the future." To entitle a person to recover under the latter section there must be evidence "to show such a degree of probability of their [the injuries] occurring as amounts to a reasonable certainty that they will result from the original injury." *Silvester v. Scanlan*, 136 Cal.App. 107, 111, 28 P.2d 97, 99. Here the undisputed evidence is that the child made a normal recovery and will suffer no permanent disability.

[2] The items of physical suffering, pain, and mental anguish, which in so many cases go to make up the "detriment" in cases of this kind, were incapable of proof because of the age of the child. There was neither medical nor scientific testimony offered to show whether the child suffered any pain at all, or over any appreciable period. Manifestly, she did not know what

happened to her and, not knowing, was without fear or mental anguish. If the bones of the leg at that age are so tender that they would knit without much pain, the child's suffering would be appreciably less than that of a grown person. All these matters are in the sphere of conjecture, and the jurors could not call on their own experiences, because experiences at that age are not registered. Ordinarily when the individual has received no permanent injuries—no scars, deformities, mental or nervous defects, the award in cases of this kind is in the nature of a monetary compensation for the physical and mental suffering. But here the child would be unable to enjoy the "compensation" without being reminded of the injuries. This factor makes it the more difficult to determine what will "compensate for all the detriment" caused by the negligent act. These circumstances leave no sound basis upon which the damages can be fairly estimated, but, bearing in mind that the child suffered no permanent injuries and that she was normal and well at the time of the trial, we cannot escape the conclusion that the award was grossly disproportionate to the physical injuries proved, and that this award was prompted by the prejudice raised against the defendant, as heretofore noted.

Only two of the cases cited to us give any assistance in the solution of the problem. They are *Gackstetter v. Market St. Ry. Co.*, 10 Cal.App.2d 713, 52 P.2d 998, and *Trigueiro v. Skow*, Cal.App., 74 P.2d 836. In both cases the plaintiff was a child about four years of age. In both, the physical injuries were somewhat similar to those here, but in both some evidence was taken of the sufferings of the victim, and of the fact that some permanent injuries would result. In the first case the verdict was reduced to \$5,000. In the second it was reduced to \$3,000. In the *Skow Case* the child suffered a fracture of one femur and abdominal injuries. The medical and hospital treatment was similar to that given the plaintiff herein, but the mother recovered special damages in the sum of \$898. Upon a review of all the evidence in the light of these decisions, we conclude that a judgment of \$4,000 is an ample award.

For these reasons the judgment is reversed and the cause remanded for a new trial upon the issue of damages alone, unless within thirty days from the filing of the remittitur in the trial court plaintiff shall remit from the judgment all except

the sum of \$4,000 and the costs taxed therein. If such remission be so made, the judgment shall stand affirmed as so modified, and plaintiff shall recover her costs of appeal.

We concur: STURTEVANT, J.;
SPENCE, J.



SPARRER et al. v. KERSGARD et al.*
Civ. 10699.

District Court of Appeal, First District,
Division 2, California.

April 26, 1938.

As Modified on Denial of Rehearing
May 26, 1938.

Hearing Granted by Supreme Court
June 24, 1938.

1. Automobiles ⇨242(1)

A motorist driving with a friend would be presumed not to have been taking a chance of seriously injuring the friend or himself, as respects whether motorist was guilty of willful misconduct so as to be liable under guest statute for injuries sustained by friend in accident. Code Civ.Proc. § 1963, subds. 1, 4; St.1935, p. 154, § 403.

2. Automobiles ⇨244(20)

Evidence held insufficient to show that motorist approaching curve at night at a speed in excess of that prescribed by statute and on wrong side of road and without knowledge of curve was guilty of such "willful misconduct" as would make him liable under guest statute for injuries sustained by guest when automobile overturned. St. 1935, pp. 154, 176, §§ 403, 510 et seq.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Action by Louise A. Sparrer, a minor, by her guardian ad litem, Max X. Sparrer, and another, against Alfred O. Kersgard and another, for personal injuries sustained in an automobile accident. From a judg-

ment for the plaintiff, the named defendant appeals.

Reversed.

Frank V. Campbell and Walter E. Rankin, both of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Jensen & Holstein and Robert E. Cassin, all of San Jose, for respondents.

STURTEVANT, Justice.

This is an action for damages for personal injuries incurred by the plaintiff Louise A. Sparrer, a guest in the defendant's automobile at the time of the accident complained of. The plaintiff was a minor and her parents joined as parties plaintiff. Alfred O. Kersgard, the owner and driver of the automobile, was a minor, and prior to the date of the trial his father was appointed his guardian ad litem. For the purposes of this opinion, Louise A. Sparrer, the passenger, will be referred to as the plaintiff, and Alfred O. Kersgard, the driver, will be referred to as the defendant. The action was tried before the lower court sitting with a jury. A verdict was returned in favor of the plaintiff, and from the judgment entered thereon the defendant appealed. In his brief he presents many points, the principal one of which is that the evidence did not warrant the jury in bringing in the verdict finding the defendant had been guilty of willful misconduct, such as to make the defendant answerable to the plaintiff in damages under section 403 of the Vehicle Code, St.1935, p. 154.

On November 11, 1936, the plaintiff, a girl of eighteen years of age, was residing with her family at Willow Glen near San Jose. At that time she was in her senior year in high school. At some time in the past she had traveled the streets and roads hereinafter referred to, but the dates on which she had done so and the extent to which she had traveled said roads does not appear in the record. Some three or four months prior to the date above mentioned the plaintiff had met the defendant. After they became acquainted she had ridden with him on various occasions. At certain times she "went out with him." During that entire period and down to the date of the accident they were "good friends."

On November 11, 1936, no schools were held; however, the next day was school day and both parties were intending to attend their classes. The defendant had not prepared his lessons and at the time of the accident, about 8:45 p. m., was returning for the pur-

pose of doing his home work. He owned a model A Ford coupé. Shortly after noon he called at the residence of the plaintiff and the two went to attend a football game in the stadium at San Jose. A short time before the game was finished the plaintiff and the defendant entered the automobile and started for a drive toward the Big Trees in Santa Cruz. On the outward road they paused at Holy City and there they entered a soft drink parlor and had a drink of Coca-Cola. Having had that refreshment they turned back to return to their homes. Between Holy City and Los Gatos, the exact place not specified in the record, the plaintiff complained to the defendant that he drove too fast. He testified that she made no other complaint on that subject during the day. The plaintiff testified she made the complaint above mentioned. She also testified that: "Any number of times I had cautioned him about his driving but never really told him to slow down." The record does not disclose it was her contention that she had so cautioned the defendant on any other occasion on the date the accident occurred. The plaintiff testified that the defendant drove 50 miles an hour; sometimes that he drove at that speed around curves; and sometimes that he did not travel that fast. She testified that at times he drove on the left-hand side of the road. She did not specify any time or place except as will hereinafter be noted. She also testified that she did not drive a car, that she did not see the speedometer, that the dash light was not burning, and that during a portion of the time it was dark.

In presenting the case in the trial court the defendant used a diagram, Defendant's Exhibit C. On that diagram a section of the road leading from San Jose to Los Gatos is drawn. Another road known as Dry Creek road branches off of the former and leads to Willow Glen. The record discloses that the defendant traveled the latter road when attending the high school a year and a half previously. How frequently he traveled the road the record does not disclose. However, it does appear that since his high school days the road has been changed and paved, although the changes made are not disclosed in the record. Traveling northerly on the San Jose-Los Gatos road on their return, the defendant turned into the Dry Creek road which leads easterly in the direction of the plaintiff's home. Dry Creek road is located in the bottom of a cut that was formerly a creek. The former banks

of the creek arise on either side. The road leads down hill on a grade of about one-half of 1 per cent. The road contains different curves, some to the right, and some to the left. Some of the curves are sharp. The curve where the accident happened is 85 degrees—nearly a right angle, and is a curve to the right.

The plaintiff testified that as they proceeded along Dry Creek road the defendant drove 50 miles an hour, that the car swayed, and that she was holding onto the seat. Continuing, she testified as follows: "The accident happened on a turn. As we approached that turn Mr. Kersgard took the turn as it came. I know that the car turned over. I was more or less stunned. I was not knocked unconscious. We were thrown out of the car. After the accident the car was facing the opposite direction. Before the accident the car, I imagine, was just about the middle of the road. We had been traveling about the middle. I mean we had been traveling in the center of the road. There was no white line on that road. As we approached the curve where the car left the roadway that is a sharp turn. Where the Dry Creek road leaves the San Jose-Los Gatos road there is a service station. As Mr. Kersgard came down from the service station he continued his same course of speed." The plaintiff did not claim she knew of the approach to the sharp turn, nor did she claim the defendant had any information on the subject.

The defendant testified that as he approached the turn he was driving at about 45 miles per hour, although, as he stated, he did not have a dash light and did not look at the speedometer—"I know it was between 35 and 45 somewhere—between 35 and 40 miles when I went around this particular curve. Coming down from Santa Cruz from Holy City when there was straightaway I went 45 miles an hour and slowed down a little bit on the corners. I would not know exactly how much I slowed down because as I say there was no light on the dash and I couldn't see the speedometer. * * * As we left the intersection of the two roads I slowed down gradually and then as I got down to this straightaway I picked up speed. The car had lights and they were lit and in good order. It had brakes but after the accident I found that one of the front brakes was not very good. As I drove down the Dry Creek road I couldn't say definitely the speed I attained."

Continuing, the defendant testified: "As we approached this curve we were talking and didn't expect anything like that, and I drove right up to it, and the lights flashed on this telephone pole and it came so unexpected and I didn't apply the brakes any. I just went around the end of the road and had my foot off the gas as I started around the corner, and didn't expect such a sharp corner. I didn't know it was going to be such a sharp curve, I didn't know where it was going to come out of; and the wheels came off the pavement after we finished the curve, and the front wheels took hold and my body went forward and I put on the brakes and it just swerved the car around. * * * As I approached this curve here which I have just described I didn't know how sharp that turn was. * * * I had no intention of injuring either myself or Miss Sparrer as I approached that turn, I didn't have any intention of doing it purposely or anything of that sort."

Besides the plaintiff and the defendant there was no other eyewitness. Immediately after the accident and before the car was moved the traffic officers arrived. They found the car on the bank at the side of the road on the defendant's right-hand side but facing in the direction from which it had come. It had turned completely over and end for end. It stood at a point about 100 feet forward from the apex of the curve. The last 120 feet of the path of the car in the road was marked by burned rubber skid marks on the defendant's left-hand side of the road.

[1,2] After all of the evidence had been taken the defendant made a motion that the jury be directed to bring in a verdict in his favor. The trial court denied the motion and the defendant claims the trial court erred. We think that claim is well founded. It must be conceded at once that there was evidence that the defendant violated the statute prescribing the speed of motor vehicles and that he was driving on the wrong side of the road. *St.1935*, p. 176, § 510 et seq. But such facts, standing alone, do not constitute willful misconduct. *McLeod v. Dutton*, 13 Cal.App.2d 545, 549, 57 P.2d 189. There is no evidence that as the defendant drove down the Dry Creek road he knew, or should have known, of the location of said turn, or the nature of it. True, he traveled over the road a year and a half before when he went to high school. But the record shows that since

that date the road had been paved and there is no evidence that the defendant traveled the road so frequently as to become familiar with each and every turn in it, and to be able, at 9 o'clock at night in the middle of November, eighteen months later, to retain a mental picture of each portion of the road and bear its nature in mind. He testified he had no such knowledge and such testimony is not contradicted by any evidence in the record. On the contrary, it will be presumed the defendant was not taking a chance of seriously injuring his "good friend," the plaintiff, or of injuring himself. Code Civ.Proc., § 1963, subs. 1 and 4. Moreover, the defendant testified he was in a hurry to get home and prepare his lessons for the next day. That fact alone serves to contradict the contention that he was trifling with danger.

The plaintiff says the defendant testified he resided at Campbell. She argues therefore that he always resided at Campbell. She also says he testified that a year and a half or two years before the trial, he attended high school and at that time traveled over the Dry Creek road. The plaintiff does not show the relative location of the high school the defendant attended from the town of Campbell, but she argues he was "familiar" with the Dry Creek road. It is sufficient to state that the record does not show the fact. She stresses the fact that she cautioned the defendant. As hereinabove recited there was evidence that she did so several miles back, but there was no evidence that she cautioned him as to any turn in the Dry Creek road.

We have set forth every material fact contained in the record. It is clear that the evidence does not disclose that the defendant, prior to entering the curve where the accident occurred, knew, or should have known, of the dangers in traversing it and therefore that the defendant is not liable. *Helme v. Great Western Milling Co.*, 43 Cal.App. 416, 185 P. 510.

In the case entitled *Meek v. Fowler*, 3 Cal. 2d 420, at page 426, 45 P.2d 194, 198, the court said: "His conduct under the circumstances constituted, at most, gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of, or that he was utterly indifferent to, the rights of his guests. While his judgment, under the circumstances confronting him, may have been poor, it does not appear that he was wantonly reckless in exposing his guests to danger, nor did his

conduct partake of the nature of a willful, intentional wrong." That language is peculiarly applicable to the facts in the instant case.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



26 Cal.App.2d 252

GORDON et al. v. KIFER.

Civ. 11784.

District Court of Appeal, Second District,
Division 2, California.

May 5, 1938.

Hearing Denied by Supreme Court
July 1, 1938.

1. Stipulations ☞14(12)

In personal injury action where defendant entered into stipulation, with opposing counsel which was accepted by court, not to raise any issue on appeal based on opposing counsel's reference to an insurance company, the waiver was valid and defendant could not present the question regarding reference to insurance company on the merits in the appellate court.

2. Stipulations ☞14(11)

Where defendant entered into stipulation waiving alleged misconduct of plaintiff's counsel in referring to insurance company on condition that court would instruct jury that no insurance company "was involved," court's instruction that there was "no insurance company involved as a defendant in this action" sufficiently complied with defendant's stipulation.

3. Appeal and error ☞207

The question of alleged misconduct of plaintiff's counsel in personal injury action, in referring to insurance company, could not be raised for first time on appeal.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Billie Jack Gordon, a minor, by his guardian ad litem, Adalee Chadwell, and others, against Rudolph J. Kifer, to recover damages arising out of personal

injuries sustained by the minor plaintiff. From an adverse judgment, defendant appeals. On motion to dismiss appeal.

Motion granted.

C. F. Jorz, of Los Angeles, for appellant.

Ira J. McDonald, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This case comes before us on a motion to dismiss the appeal upon the grounds that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appeal is from a judgment in favor of the plaintiffs in the trial of an automobile accident case in which eight year old Billie Jack Gordon was badly injured by the automobile of the defendant. During the trial the plaintiff's father testified as follows:

"Q. Was there some other conversation at that time? A. Yes, sir. I told him then my wife was in the hospital and I did not want her to know anything about the boy being hurt. If she did she would die. I told him I was working at the Guastly vineyard and I was not earning very much. * * *

"A. (Continuing) He said then, 'I did not see the boy until it was too late; I was right on him', he said, 'I swerved to the right and applied the brakes.' He said he felt his responsibility—* * * He said he felt the responsibility of that, and he said he was fully protected by insurance. * * *

"A. (Continuing) He said he was completely protected by insurance, fully covered, and he said I did not have anything to worry about.

"Attorney for defendant: Your Honor, I am renewing my motion for a mistrial, and I want the record to so show after the last statement made by the witness here.

"The Court: Motion for a mistrial denied."

During the opening argument counsel for plaintiffs said: "Mr. Kifer denied he had the conversation with Mr. Chadwell where he admitted his liability and admitted he was fully covered by insurance. Is there any significance in that?

"Attorney for defendant: I have repeatedly during the course of this trial ques-

tioned and challenged the good faith of counsel here with respect to the injection into the case of sympathy and prejudice. * * * If the court will give my instruction that there is no insurance company defendant in this action, I will withdraw my motion.

"Attorney for plaintiff: Well, that is all right, too."

Again in his closing argument counsel for plaintiff said: "Now, ladies and gentlemen, Mr. Jorz (attorney for defendant) opened this up; I would not have said anything about it, but he opened it up; he told you that the court would instruct you that the insurance company was not a defendant in this action. Well, that is true, ladies and gentlemen, but it just happens to be the law in this state that you cannot sue the insurance company.

"Attorney for defendant: * * * I assign that as misconduct, and I move for another mistrial."

But later he said: "If the court will instruct the jury that no insurance company is involved, and that the jury is to decide this case on the law and the evidence, without anything else, I will waive my motion, or withdraw my motion for a mistrial.

"Attorney for plaintiffs: I will stipulate that the court may so instruct the jury. * * *

"The Court: Well, we are going to have this issue arise again, if the jury brings in a verdict for plaintiff; we are going to have this same question on a motion for a new trial.

"Attorney for defendant: Well, I am willing to stipulate that the court may so instruct the jury, and on a motion for new trial I will agree not to raise any issue on this fact at all, or on appeal. I will waive any right to refer to the subject. In other words, I am taking my chance on this jury.

"Attorney for plaintiffs: The plaintiff will accept such a stipulation.

"The Court: All right. * * * Ladies and gentlemen of the jury, you are in-

structed that there is no insurance company involved as a defendant in this action. You are further instructed that you are to decide this case on the law and the evidence that has been submitted to you, and on the instructions of the court."

[1] The above misconduct is the only question presented on appeal. The defendant entered into a stipulation with opposing counsel, which was accepted by the court, not to raise any issue on this fact on appeal, and he waived any right to refer to the subject. The waiver was good. 2 Cal.Jur. 225, note 15; 2 Am.Jur., Appeal and Error, § 204, p. 971. After waiving his right to appeal on the question and after taking his chance with the jury thereon, and after the jury decided against him, he cannot be heard to present the question on the merits in this court.

[2] The defendant contends that the misconduct was waived only upon express condition that the court would instruct the jury that no insurance company "was involved," and that the condition was not fulfilled in that the court instructed the jury "that there is no insurance company involved as a defendant in this action," and therefore his waiver is not binding upon him. It will be observed that the defendant, the first time he expressed the stipulation, expressed it similarly to the court, for he said, "that there is no insurance company defendant in this action." When the instruction was given to the jury the defendant made no objection, no complaint that it did not comply with his stipulation, and we are of the view that there was a full compliance with the defendant's stipulation.

[3] Furthermore, the defendant again expressly waived the issue in presenting his motion for a new trial. He cannot be heard to raise the matter on appeal for the first time.

Motion to dismiss the appeal is granted.

We concur: WOOD, J.; McCOMB, J.

26 Cal.App.2d 216

PEOPLE v. BISPHAM.

Cr. 1615.

District Court of Appeal, Third District,
California.

May 2, 1938.

1. Criminal law ☞911

The grant of a new trial is largely within the discretion of the trial judge, whose province it is on motion for new trial to pass upon the credibility of the witnesses and upon the weight and sufficiency of the evidence.

2. Criminal law ☞1156(1)

The determination of the trial court to deny or grant a new trial will not be disturbed on appeal except for clear abuse of discretion.

3. Criminal law ☞935(1)

The grant of a new trial for insufficiency of evidence to sustain conviction of willful and malicious burning of property and burning insured property was not abuse of discretion. Pen.Code, § 448a.

4. Arson ☞37(1)

In prosecution for willful and malicious burning of property and burning insured property, the corpus delicti is the fact of the criminal origin of the fire, which must be established before the statement of the accused may be admitted against her. Pen. Code, § 448a.

5. Criminal law ☞935(1)

In prosecution for willful and malicious burning of property and burning insured property, wherein admissions alleged to have been made by the accused that accused previously had offered to pay witnesses to burn the buildings were admitted against accused, grant of new trial for failure to establish the criminal origin of the fire outside of the alleged admissions was justified. Pen. Code, § 448a.

sufficient to sustain the conviction, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Lawrence J. Skirving, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant herein was accused by the grand jury of arson; of burning insured property, and of willful and malicious burning of property as defined in section 448a of the Penal Code.

After arraignment and trial before a jury, a verdict was returned finding defendant not guilty of arson, but guilty of willful and malicious burning of property, and also guilty of burning insured property.

The court granted a motion for a new trial on the ground that the evidence was not sufficient to sustain the conviction. From this order the People prosecute this appeal.

On the afternoon of July 4, 1937, a one-story business building in Grass Valley, occupied as a beauty parlor and real estate office, was practically destroyed by fire. Adjacent to this building was a two-story building occupied by two stores on the lower floor and by a rooming house on the second floor. The rooming house and beauty parlor were operated by the defendant, both buildings being owned by a person other than defendant. It seems to be agreed by all concerned that the fire started in the attic over the beauty parlor and spread rapidly. The furnishings in the rooming house and the equipment in the beauty parlor were owned by the defendant. In September, 1936, she had insured the furnishings in the rooming house for \$750, and on the same day had insured the equipment in the beauty parlor for the same amount. The original application had been for the sum of \$1,500 on each of these two items, but the agent had refused to issue insurance for that amount on the ground the value of the property did not justify the same. A short time later defendant secured additional insurance of \$750 on each parcel of property, making a total of \$3,000 on the two items. At the time of the fire there was no one in the beauty parlor, and it was necessary for the firemen to break into the building.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Alice G. Bispham was convicted of willful and malicious burning of property and burning insured property and, from an order granting a motion for a new trial on the ground that the evidence was in-

No direct evidence was offered as to the means employed in setting the fire, if it were set, nor was there direct evidence that the defendant, or any person acting under her direction, actually applied fire to the building. The only evidence purporting to connect the defendant with the commission of any crime was certain admissions alleged to have been made to the effect that some time prior to the fire defendant offered to pay two witnesses to burn the building. One of these witnesses was a paroled convict, the other a man who apparently had not been long in that community.

It is conceded by the Attorney General that admissions made or purported to have been made by defendant cannot be considered unless it was first established that a crime had been committed. Such was the situation in the case of *People v. Jenkins*, 67 Cal.App. 631, 228 P. 405. There the prosecution established that the building burned down. They introduced a confession by defendant. The conviction was set aside because the prosecution had failed to prove that the fire was of human origin.

The only evidence offered by the prosecution in the case here before us attempting to connect defendant with the fire other than these alleged admissions was that the fire originated in the attic over the beauty parlor; that the attic was open and vacant; that there was no one in the beauty parlor at the time the fire started, and that the same burned with great rapidity; and that prior to the breaking through of the flames no odor of smoke had been noticed. It was also asserted the property had been overinsured. An electrician, who had examined the wiring a short time prior to the fire and installed a Neon light on the building, testified that at that time the wiring in the attic was in good condition.

The trial court, after hearing and seeing the witnesses, gave it as his opinion the evidence was insufficient to support the verdict.

[1-3] It has been frequently held that the granting of a new trial is largely within the discretion of the trial judge, whose province it is, on a motion for a new trial, to pass upon the credibility of the witnesses and upon the weight and sufficiency to be accorded the evidence. The determination of the trial court to deny or grant a new trial will not, therefore, be disturbed on appeal except for a clear abuse of its dis-

cretion. *People v. Simpson*, 134 Cal.App. 646, 25 P.2d 1008. This rule is so well established that we need not cite other authorities in support thereof. We find no abuse of such discretion here.

[4, 5] Inasmuch as the corpus delicti in a case of this kind is the fact of the criminal origin of the fire, and that the corpus delicti must be established before the statements of the defendant may be admitted against her, the court was further justified, in view of the record, in granting a new trial.

The order granting the new trial is, for the foregoing reasons, affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



26 Cal.App.2d 309

PEOPLE v. FEATHERLY.

Cr. 2017.

District Court of Appeal, First District,
Division 2, California

May 11, 1938.

Criminal law ⇐ 1130(4)

Where judgments were entered on March 7, 1938, transcript was filed in appellate court on March 25, 1938, cause was regularly placed on calendar for oral argument on May 9, 1938, but no appearance was made for appellant, no brief was filed in his behalf and time granted for that purpose had long since expired, judgments and order denying new trial were affirmed. Pen. Code, § 1253.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, J.

Sidney Featherly was convicted of assault with a deadly weapon and murder in the second degree, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of the city and county of San Francisco of felonies, to wit, assault with a deadly weapon and murder in the second degree.

Judgments on the verdicts were duly entered on March 7, 1938, and defendant gave notice of appeal from the order denying him a new trial and from the judgments. The transcript was filed in this court on March 25, 1938. The cause was regularly placed on the calendar for oral argument on May 9, 1938. No appearance was made for appellant at the time the cause was called for hearing. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the order denying a new trial are affirmed.



26 Cal.App.2d 318

PEOPLE v. RAMIREZ.

Cr. 3100.

District Court of Appeal, Second District,
Division 2, California.

May 11, 1938.

Criminal law ⇐1130(4)

A motion to affirm judgment because of appellant's failure to file brief on appeal or other appearance within time provided by law will be granted. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by the People against Henry G. Ramirez. From an adverse judgment, the latter appeals.

Affirmed.

William J. F. Brown, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

PER CURIAM.

At the calling of this case for hearing upon its merits the Attorney General mov-

ed to affirm the judgment under section 1253 of the Penal Code upon the ground that no brief on appeal has been filed or other appearance made herein within the time provided by law. The motion is good and it is granted.

Judgment affirmed.



26 Cal.App.2d 282

PEOPLE v. COOK.

Cr. 1622.

District Court of Appeal, Third District,
California.

May 9, 1938.

Criminal law ⇐1130(4)

Under the Penal Code, where transcript was filed and cause was regularly placed on calendar for oral argument, but accused did not file brief or appear when case was called, conviction was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Ray Cook was convicted of grand theft, and he appeals.

Affirmed.

James F. Gaffney, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of grand theft, a felony.

The transcript on appeal was filed in this court March 1, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 9, 1938. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment is affirmed.

BUSSEY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10812.

District Court of Appeal, First District,
Division 1, California.

May 2, 1938.

1. Workmen's compensation ☞1704

The credit and weight to be given the testimony in a compensation proceeding is for the Industrial Accident Commission.

2. Workmen's compensation ☞1408

Facts established by the evidence in compensation proceeding may not be disregarded by the Industrial Accident Commission.

3. Workmen's compensation ☞1407

Compensation claimant's credibility was not destroyed, so as to justify denial of an award, because he had told physician that pain was felt at a point a few inches from the place where the hernia was found and because claimant had allegedly stated to insurance carrier that he did not slip or stumble at time of injury, but testified at hearing that he slipped on a rug.

4. Workmen's compensation ☞1538

Evidence authorized award of compensation to employe on ground that hernia was proximately caused by an accident arising out of and in course of employment.

Appeal from Industrial Accident Commission.

Proceeding under the Workmen's Compensation Law by Harold Bussey, claimant, by his guardian ad litem, L. E. Hidden, for an adjustment of his claim for compensation, opposed by the Fox West Coast Theatres, Inc., employer, and the Fireman's Fund Indemnity Company, insurance carrier. From an adverse award, the claimant appeals.

Award annulled.

Henry Wenzlaff, of San Bernardino, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

Petitioner applied to respondent commission for an adjustment of his claim for compensation and the same was denied. The admitted facts of the case are that on or about October 22, 1937, he was employed as a doorman by the Fox West

Coast Theatres, a California corporation. While acting within the scope of his employment he picked up a can of film weighing approximately 100 pounds. In attempting to lift it to his shoulder he experienced a sharp pain in his right side, below his ribs, which forced him to lower the can. The pain continuing, he reported the fact and was directed to consult a physician. This he did, and examinations showed that he was suffering from a strangulated hernia which necessitated an operation. It is undisputed that he had performed no heavy work other than his duties in the theater, and that he has since been unable to perform any work which would involve lifting or other physical effort.

The commission found that the hernia complained of was not caused or exacerbated by an injury arising out of or in the course of his employment. The only grounds urged by respondents for the denial of compensation are that the applicant upon first reporting to a physician who was acting for the insurance carrier did not describe as the seat of the pain from which he was suffering the exact region of the hernia, namely, the groin, but referred to the pain as being immediately below his ribs on the left side. This physician did not discover the source of the trouble, but two days later, upon further examination, another physician diagnosed the case correctly and performed an operation. The applicant testified that when he consulted the first physician he was ignorant of the exact location of the groin, but indicated upon his person the place where he felt the pain. There is no question as to the fact of the hernia, and no claim is made that it was a pre-existing condition; all the evidence in this respect being to the contrary. It further appears that applicant stated to the insurance carrier that he did not slip or stumble at the time of the injury, while at the hearing he testified that he slipped on the rug in the theater. The referee who presided at the hearing was of the opinion that these were discrepancies in applicant's testimony sufficient to destroy his credibility.

[1-4] Although it is within the province of the commission to determine the credit and weight to be given the testimony, it is equally well settled that facts established by the evidence may not be disregarded, and the circumstances that the pain felt or indicated was at a point a few

inches from the place where the hernia was found, or that the applicant did or did not slip or stumble at the time, the fact of the injury being indisputable, were insufficient alone to destroy his credibility or to justify the denial of an award for compensation. As in the case of *Singer v. Industrial Accident Commission*, 105 Cal.App. 374, 287 P. 567, the facts here were such as to reasonably support no conclusion other than that the hernia was proximately caused by an accident arising out of and in the course of the employment.

The award is annulled.



26 Cal.App.2d 310

PEOPLE v. MERRITT.

Cr. 2006.

District Court of Appeal, First District,
Division 2, California.

May 11, 1938.

Criminal law ⇨1130(4)

Where clerk's transcript upon appeal was duly filed and cause was regularly placed on calendar for oral argument and no appearance was made for accused at the time the cause was called for hearing and no brief was filed in his behalf, and the time granted for that purpose had expired, conviction would be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

William Merritt was convicted on four counts of grand theft and two of petty theft, and he appeals.

Affirmed.

Leo A. Sullivan, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

Defendant and appellant was convicted in the superior court of the state of California in and for the county of Alameda

of felonies, to wit, four counts of grand theft, and two of petty theft.

Judgment on the verdicts was entered November 1, 1937. The clerk's transcript upon appeal was filed December 24, 1937, and the reporter's transcript on March 22, 1938. The cause was regularly placed on the calendar for oral argument on May 9, 1938. No appearance was made for appellant at the time the cause was called for hearing. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are affirmed.



CASNER v. DAILY NEWS CO., Limited,
et al. *

Civ. 10785.

District Court of Appeal, First District,
Division 2, California.

May 5, 1938.

Hearing Granted by Supreme Court
July 1, 1938.

1. New trial ⇨2

Plaintiff could not move for new trial of judgment of dismissal, entered on plaintiff's motion at close of evidence.

2. New trial ⇨2

Orders granting defendants' motions to set aside judgment of dismissal, which was entered on plaintiff's motion at close of evidence, and to grant defendants' prior motions for directed verdict because of matters independent of and subsequent to trial, did not warrant plaintiff's motion for new trial.

3. Appeal and error ⇨345(1)

Where plaintiff's motion for dismissal at close of evidence was granted, judgment of dismissal was set aside, and defendants' prior motions for directed verdicts were granted because of matters independent of and subsequent to trial, pendency of plaintiff's subsequent motion for new trial did not toll limitation on appeal, since plaintiff was not entitled to move for new trial. Code Civ.Proc. § 939.

*For subsequent opinion see 84 P.2d 1032.

4. Appeal and error — 112

That orders were void would not warrant dismissal of appeal therefrom.

5. Appeal and error — 112

Orders directing that judgment of dismissal, which was entered on plaintiff's motion, be vacated, and that judgments for defendants be entered, were not void as respects vacation of judgment, and were "appealable orders."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Cannie Casner against the Daily News Company, Limited, and others, for the wrongful death of Mark Casner. From adverse judgments and orders, plaintiff appeals. On motions to dismiss the appeal.

Motions granted.

Freidenrich & Selig, Philip Selig, Jr., and Phillip Barnett, all of San Francisco, for appellant.

Cyril Appel, William M. Abbott, and Ivores R. Dains, all of San Francisco, for respondents Market St. Ry. Co. and others.

George M. Naus and Donald Seibert, both of San Francisco, for respondents Daily News Co., Ltd., and others.

STURTEVANT, Justice.

The defendants have made motions to dismiss the appeal of the plaintiff. An understanding of the motions involves a consideration of the following facts: As the surviving widow of Mark Casner, the plaintiff commenced an action to recover damages for the wrongful death of the decedent. She named as defendants Market Street Railway Company, a corporation, and John Bartlett, one of its employees, and she also named Daily News Company, Ltd., a corporation, and William Cohn, one of its employees. The Market Street Railway Company and John Bartlett appeared and filed an answer. The Daily News Company, Ltd., and William Cohn, its employee, appeared and filed an answer. The action was tried before the trial court sitting with a jury. After all of the evidence had been taken and all of the parties had rested, the

Market Street Railway Company and its employee made a motion for a directed verdict. The Daily News Company, Ltd., and its employee made a similar motion. Both motions were argued. Before the trial court ruled on said motions the plaintiff made a motion to dismiss the action. The latter motion was granted. Thereupon, April 7, 1937, the jury was discharged. Thereafter, on April 26, 1937, Market Street Railway Company and John Bartlett served on the plaintiff a notice of motion that they would apply for an order vacating the order of dismissal and at the same time apply for an additional order granting their motion for a directed verdict. A similar notice of motion was served and filed by the other defendants. On June 28, 1937, both motions were granted. A formal written document evidencing the ruling in favor of the Market Street Railway Company and John Bartlett was signed by the judge of the trial court. After the signature of the judge appears the following: "Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that Cannie Casner plaintiff, do take nothing by this action as against Market Street Railway Company, a corporation and John Bartlett, defendants, but that judgment be and the same is hereby entered herein in favor of said defendants and against the said plaintiff for said defendants' costs and disbursements incurred in this action amounting to the sum of \$——." Said document is indorsed "Filed June 29, 1937." It is also indorsed "Recorded Volume 410 page 195, June 30, 1937." Attached to said document is a certificate by the clerk in which he certifies, " * * * the foregoing to be a true copy of the judgment entered in the above entitled cause." The record also discloses a formal order signed by the trial judge vacating the order of dismissal and ordering and directing the entry of "judgment in favor of said defendants, Daily News Company, Ltd., a corporation, and William Cohn, and each of them, and against Cannie Casner, the plaintiff in said action, denying the relief prayed for in plaintiff's complaint against said defendants, and each of them, and for costs." Said document is indorsed "Filed July 1, 1937. Recorded Volume 410 page 351, July 2, 1937." To that document is attached the certificate of the clerk that it is a true copy of the judgment entered in the above-entitled cause.

On July 16, 1937, the plaintiff served and filed a notice of intention that she would move for a new trial. Said notice specified all of the statutory grounds. The record does not disclose that any order was ever made either granting or denying the new trial.

On September 14, 1937, the plaintiff served and filed a notice of appeal from (1) the judgment recorded in book 410 at page 195; (2) the judgment recorded in book 410 at page 351; (3) from the order dated June 28, 1937, vacating the order of dismissal dated April 7, 1937; and (4) from the order denying plaintiff's motion for a new trial.

The transcript was filed in this court on February 21, 1938. On April 1, 1938, Daily News Company, Ltd., and William Cohn served and filed a notice of motion to dismiss said appeal. Such notice was based on the ground that the appeal was taken 73 days after the entry of the judgments and orders appealed from. On April 4, 1938, the other defendants served and filed a similar notice of motion. Thereafter, on April 11, 1938, said motions were duly presented.

[1,2] It is conceded that, if the pendency of proceedings based on the notice of intention to move for a new trial did not toll the statute, Code Civ.Proc. § 939, then the appeal was not taken in time and the motions to dismiss should be granted. The sole question presented is, therefore, Was the plaintiff, under the facts, entitled to move for a new trial? We think it is clear that she was not. The action was, as stated above, one to recover a judgment for damages for wrongful death. The plaintiff made a motion to dismiss. Her motion was granted. Under well-settled rules of law she was not entitled to move for a new trial of the judgment of dismissal. 2 Cal.Jur. 217. After her motion had been granted the defendants later made motions to set the judgment of dismissal aside. Their motions were granted. The order granting said motions did not warrant a motion for a new trial because neither motion involved a re-examination of either a question of fact or of law presented by the pleadings. *City of Pasadena v. Superior Court*, 212 Cal. 309, 313, 298 P. 968-970. Said motions were made on matters independent of and subsequent to the trial and the plaintiff was not authorized to move for a new trial.

Gray v. Cotton, 174 Cal. 256, 162 P. 1019. In so far as the motions asked for affirmative relief the same comments are pertinent. The judgment of dismissal was entered April 7, 1937. That judgment terminated the trial. The orders made pursuant to defendants' motions thereafter were not in response to questions of fact or law presented by the pleadings and constituted no part of the trial of the action. *Harper v. Hildreth*, 99 Cal. 265, 270, 33 P. 1103-1105.

[3] It follows that under the facts presented by the record the plaintiff was not entitled to move for a new trial and that the pendency of the new trial proceedings did not toll the statutory time within which an appeal might be taken. *City of Pasadena v. Superior Court*, 212 Cal. 309, 298 P. 968.

[4,5] In opposing the granting of the motions of the defendants to dismiss the appeal the plaintiff suggests that this court of its own motion dismiss the appeal. In making that suggestion the plaintiff calls to our attention the fact that the action was tried by the trial court sitting with a jury, that the jury was never instructed to bring in a verdict, that it never brought in a verdict, and therefore the orders dated respectively June 29, 1937, and July 1, 1937, were void. *Vitamin Milling Corp. v. Superior Court*, 1 Cal.2d 116, 33 P.2d 1016. But, conceding that in so far as said orders directed judgments to be entered in favor of defendants they were void, such facts do not warrant this court in dismissing the appeals. 2 Am.Jur. 870; *De Jarnatt v. Marquez*, 127 Cal. 558, 60 P. 45, 78 Am.St.Rep. 90. Again, said orders were twofold: They directed that the judgment of dismissal be vacated and that judgments in favor of defendants be entered. In so far as said orders purport to vacate the judgment of dismissal dated April 7, 1937, it may be argued they were erroneous but not void orders. Furthermore, they were made after judgment and were appealable orders. *Casner v. Superior Court*, etc., Cal.App., 74 P.2d 298. No reason appears therefore which would justify the court of its own motion in dismissing the appeal.

The motions of the defendants to dismiss the appeal are granted.

We concur: NOURSE, P. J.; SPENCE, J.

26 Cal.App.2d 311

SWANITZ v. WOLFF et al.

Civ. 10671.

District Court of Appeal, First District,
Division 2, California.

May 11, 1938.

Municipal corporations §218(11)

Where an assistant civil engineer was laid off by municipality in 1919 for lack of funds and never re-employed and the civil service commission adopted in 1924 a rule whereby the eligibility for re-appointment of persons laid off for lack of funds could be canceled in the absence of re-appointment within 2 years and struck engineer's name from the list in 1931 of which engineer learned within a few days, an application in 1935, over 4 years later, for re-establishment was barred by limitations and laches.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Proceeding in mandamus by H. W. Swanitz against Harry K. Wolff and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco, and others, to re-establish his civil service status as a hold-over assistant civil engineer. Judgment for respondents, and petitioner appeals.

Affirmed.

John J. Dailey, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco (Grover O'Connor, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

Petitioner sought a writ of mandate to compel the respondents, as members of the Civil Service Commission of the City and County of San Francisco, to make "all proper and necessary entries * * * establishing and showing that petitioner has civil service status as a hold-over assistant civil engineer." The trial court made findings of fact and conclusions of law and entered judgment denying petitioner any relief. Petitioner appeals from said judgment.

The facts are not disputed. Petitioner was duly appointed from the eligible list as an assistant civil engineer in 1913. His employment as such was practically con-

tinuous until 1919 when he and several others were laid off because of lack of funds. Petitioner apparently concedes the propriety of the lay-off. It appears that neither he nor any other person laid off in 1919 has ever been reemployed by the city as an assistant engineer. In fact, petitioner does not claim that any person has been appointed as assistant civil engineer since that time.

In 1924 the commission adopted a rule relating to so-called "hold-overs," meaning persons laid off because of lack of work or lack of funds. It provided in part: "When such 'hold-overs' have not been reappointed to a permanent position within a period of two years from the date of their last lay-off, their eligibility for reappointment may be cancelled by the commission." On February 2, 1931, the commission struck from the list of "hold-overs" under the classification of assistant civil engineers the names of all persons, including that of petitioner, who had not been appointed to any position falling within that classification since 1919. Petitioner testified that he learned of said action of the commission within a few days after the action was taken. About four years and nine months later and in November, 1935, petitioner first filed an application with the commission asking for an order establishing his status as a hold-over on the list of assistant civil engineers established in 1913. Thereafter the commission denied said application and this proceeding in mandamus was filed on June 10, 1936.

Petitioner claimed that both the adoption of the rule relating to hold-overs and the action of the commission taken pursuant thereto were in excess of and beyond the powers of the commission. Respondents claimed that as the charter made no provision relating to hold-overs, the commission had the right to make reasonable rules to cover the situation under the power granted to it by the charter to "make rules to carry out the purposes of this article." They further claimed that said rule was a reasonable one and that the action of the commission did not conflict with the rights of hold-overs as established by the decisions. *Rodgers v. Board of Public Works*, 208 Cal. 291, 281 P. 64; *Powers v. Board of Public Works*, 216 Cal. 546, 15 P.2d 156; *McGillicuddy v. Civil Service Commission*, 133 Cal.App. 782, 24 P.2d 942; *Doerr v. Civil Service Commission*, 21 Cal.App.2d 173, 68 P.2d 731. Respondents further claimed that the petition was barred by the statute of limitations and by laches.

It appears unnecessary to discuss all of the questions raised as the rights of petitioner, if any, were clearly barred by the statute of limitations and by laches as found by the trial court. *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 P. 696; *Curtin v. Board of Police Commissioners*, 74 Cal.App. 77, 239 P. 355; *Knorp v. Board of Police Commissioners*, 31 Cal.App. 539, 161 P. 12; *Wittman v. Board of Police Commissioners*, 19 Cal.App. 229, 125 P. 265; *Farrell v. Board of Police Commissioners*, 1 Cal.App. 5, 81 P. 674.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



26 Cal.App.2d 300

TAYLOR et al. v. FISHBAUGH.

Civ. 11746.

District Court of Appeal, Second District,
Division 2, California.

May 10, 1938.

Rehearing Denied May 31, 1938.

Hearing Denied by Supreme Court
July 8, 1938.

1. Physicians and surgeons ⇨14(1)

A physician had the duty to use reasonable care and diligence in the exercise of his skill and in application of his learning to accomplish the purpose for which he was employed.

2. Physicians and surgeons ⇨14(4)

A physician had duty to apply to the case that degree of care, skill, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under similar circumstances in the locality where the treatment was administered.

3. Physicians and surgeons ⇨18(9)

In malpractice action based upon physician's alleged negligence in prescribing for patient a remedy known as phanadorn, to justify submission of the issue to the jury, patient was required to present proof of negligence, or lack of care or skill on part of physician.

4. Physicians and surgeons ⇨18(8)

In malpractice action, based upon physician's alleged negligence in prescribing for

patient a remedy known as phanadorn, the issue as to what was proper practice was a question for "experts," consisting of physicians familiar with the practice concerning patient's infirmities in the locality where the patient was treated.

[Ed. Note.—For other definitions of "Expert," see Words & Phrases.]

5. Physicians and surgeons ⇨18(8)

In malpractice action based upon the physician's alleged negligence in prescribing for patient a remedy known as phanadorn, the patient could not recover in absence of testimony of other physicians familiar with practice concerning patient's infirmities in locality where the patient was treated as to what was proper practice.

6. Evidence ⇨538

In malpractice action, expert testimony of physician was inadmissible where it was not shown that such physician was familiar with work and practices of other physicians in the community in which the treatment which formed the basis of the action was given.

7. Trial ⇨84(2)

In malpractice action, objection to expert testimony of a physician on ground that no foundation had been laid justified court's sustaining objection to the testimony which was inadmissible because of insufficiency of the evidence to show that the physician was familiar with work and practices of other physicians in the community in which the treatment which formed the basis of the action was given.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Mrs. Jack W. Taylor and another against Ernest C. Fishbaugh for alleged malpractice. From a judgment of nonsuit, the plaintiffs appeal.

Affirmed.

August J. O'Connor and George Jacques Hider, both of Los Angeles, for appellants.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiffs commenced this action against defendant, a physician, to recover a judgment for damages alleged to have been caused by the conduct of the defendant in improperly, negligently and carelessly pre-

scribing for plaintiff Mrs. Taylor a remedy known as phanadorn. Plaintiffs appeal from a judgment of nonsuit entered upon motion of defendant at the termination of plaintiffs' evidence.

[1-5] Upon undertaking to treat Mrs. Taylor it became the duty of defendant to use reasonable care and diligence in the exercise of his skill and in the application of his learning to accomplish the purposes for which he was employed. It was incumbent upon him to apply to the case that degree of care, skill, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under similar circumstances in the locality where the treatment was administered. *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654; *Johnson v. Clarke*, 98 Cal. App. 358, 276 P. 1052; *Markart v. Zeimer*, 67 Cal.App. 363, 227 P. 683. In order to justify submitting the issues to the jury, it was necessary for plaintiffs to present proof of the negligence or lack of care or skill on the part of defendant. The issue as to what was or was not the proper practice was a question for experts, physicians familiar with the practice concerning Mrs. Taylor's infirmities in the locality where she was treated. Without such testimony no valid judgment could be rendered. *Hiraid v. Cochran*, 109 Cal.App. 377, 293 P. 165; *Peppercorn v. Stewart*, 114 Cal.App. 101, 299 P. 762; *Patterson v. Marcus*, 203 Cal. 550, 265 P. 222.

Plaintiffs presented as an expert witness a physician who testified that he was a graduate of a medical college and that he had practiced his profession since 1928 and in Los Angeles since 1933. A hypothetical question was then propounded to him to which objection was made on the ground, among others, that no foundation had been laid. The objection was sustained. Plaintiffs rested their case without making further effort to show the competency of the witness, and, since no expert testimony was before the court, the motion for a nonsuit was granted.

[6] In arguing that the action of the trial court in sustaining the objection to the question propounded to the witness was proper, defendant points out that it was not shown that the witness was familiar with the work and practices of other physicians in the community in which the treatment was given. In view of recent deci-

sions by reviewing courts in California, we must sustain defendant's contention. In *Rasmussen v. Shickle*, 4 Cal.App.2d 426, 41 P.2d 184, a physician was offered as an expert witness who failed to show that he possessed familiarity with the practice in the locality with respect to the treatment involved in the action. The reviewing court ruled that the trial court did not abuse its discretion in sustaining an objection to his testimony. In the recent case of *McGuire v. Baird*, 9 Cal.2d 353, 70 P.2d 915, the Supreme Court approved of the ruling in the *Rasmussen* case in the following language (page 917): "The qualifications of a witness to testify in a malpractice case are definitely and clearly established by the decisions of the courts of this state. In the recent case of *Rasmussen v. Shickle*, 4 Cal. App.2d 426, 430, 41 P.2d 184, the court very aptly defined such qualifications in the following language: 'To qualify as such expert in a malpractice case against a physician the witness must not only show himself to possess learning and knowledge of the subject of inquiry sufficient to qualify him to speak with authority on the subject, but also a familiarity with the treatment and degree of care and skill of other practitioners in the locality in question, sufficient to qualify him to say whether or not the defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances.'"

[7] Plaintiffs point out that no objection was made to the testimony of the expert upon the ground that he was not competent, and argue that under the ruling of *Reardon v. Richman Land Co.*, 21 Cal.App. 357, 131 P. 894, the objection that the foundation was not laid was insufficient to justify the trial court in sustaining the objection to the testimony of the expert. On this point we must be guided by the ruling in *Lemley v. Doak Gas Engine Co.*, 40 Cal. App. 146, 180 P. 671, wherein the Supreme Court in denying a petition for a hearing held that (page 675) "the objection 'that the proper foundation had not been laid' fairly presented the question of the sufficiency of the evidence as to the expert qualifications of the witness."

The judgment is affirmed.

We concur: CRAIN, P. J.; McCOMB, J.

26 Cal.App.2d 314

SWANEY et al. v. BLACK et al.
Civ. 11777.

District Court of Appeal, Second District,
Division 2, California.
May 11, 1938.

1. Appeal and error ⇨640, 766

Where judgment roll was on file, motion to dismiss appeal on ground that appellants had failed to conform to court rule governing index and arrangement of transcript and briefs and to statute governing appeal by notice in lieu of bill of exceptions was denied. Rules for the Supreme Court and District Courts of Appeal, rule 8; Code Civ.Proc. § 953a.

2. Appeal and error ⇨695(1)

An appellate court will not consider sufficiency of evidence to sustain findings of fact unless all evidence before trial court is included in record on appeal.

3. Appeal and error ⇨695(1)

Where reporter's transcript did not contain all evidence before trial court, District Court of Appeal was confined in review of case to any errors appearing in judgment roll.

4. Automobiles ⇨247

In action against corporation for injuries from negligent operation of automobile by second conditional buyer thereof, finding that corporate secretary, after the accident, filed affidavit of repossession stating that corporation, as assignee of first contract of conditional sale, had repossessed automobile from first conditional buyer before the accident, and had possession thereof, and finding that second conditional buyer was not driving with consent of corporation, were not conflicting so as to require reversal of judgment for corporation. St.1937, p. 2353, § 402(a, f).

5. Automobiles ⇨192(8)

Under the Vehicle Code, where conditional seller of automobile assigned contract of sale, and repossessed automobile from conditional buyer and made second conditional sale without assignee's authority, assignee was not liable for injuries from second conditional buyer's negligent driving. St.1937, p. 2353, § 402(a, f).

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Guy W. Swaney and another against Grace Black and others for injuries sustained in an automobile accident. From an adverse judgment, plaintiffs appeal, opposed by defendant Beverly Finance Company, which moves to affirm the judgment or dismiss the appeal.

Motion to dismiss denied, and judgment affirmed.

Bertram S. Harris and Y. B. Arsen, both of Los Angeles, for appellants.

Reginald I. Bauder and Charles E. R. Fulcher, both of Los Angeles, for respondent.

McCOMB, Justice.

There are presented for determination:

(1) A motion to affirm the judgment or dismiss the appeal on the ground that appellant has failed to conform to the requirements of Rule VIII, Rules for the Supreme Court and District Courts of Appeal (213 Cal. XLVI) and section 953a, Code of Civil Procedure, and

(2) An appeal from a judgment in favor of respondent after trial before the court without a jury in an action to recover damages for personal injuries.

I

[1] In view of the conceded fact that a judgment roll is on file, the motion to dismiss the appeal must be denied. Pacific Gas and Elec. Co. v. Scott, Cal.Sup., 75 P.2d 1054.

II

The trial court found the following facts:

June 20, 1936, Charles W. Porter, doing business as "Certified Service Inc.," sold a Plymouth coupé to Grace Black under a conditional contract of sale. This contract on June 30, 1936, was assigned by Mr. Porter to respondent. October 27, 1936, without obtaining a reassignment of the conditional sales contract from respondent, Mr. Porter repossessed the automobile for failure of Grace Black to comply with its terms. He thereafter, on November 4, 1936, by a conditional sales contract, purported to sell the car to Robert H. Senter. November 10, 1936, while Mr. Senter was driving the car without the express or implied permission of respondent, an accident occurred, causing personal injuries to plaintiffs. November 14, 1936, Mr. Porter assigned his contract with Robert H. Senter to respondent.

In addition to the foregoing facts the trial court made the following finding:

"VII

"That James E. Graham, as Secretary of the Beverly Finance Company, a corporation, did cause an affidavit of repossession, which affidavit was sworn to before a Notary Public, to be filed with the Department of Motor Vehicles, Division of Registration, of the State of California, on the 16th day of November, 1936, stating that on the 27th day of October, 1936, the Beverly Finance Company, a corporation, did repossess the said 1935 Plymouth Coupe automobile, 1936 License No. 4 R 7616, from Grace Black, and that the said automobile was in the possession of the said corporation, and did forward the pink slip to said automobile with the affidavit, to Sacramento, and that there was issued, on the 2nd day of December, 1936, by the Department of Motor Vehicles, Division of Registration, of the State of California, a new pink slip of title, showing Robert H. Senter, 2834 Whittier Blvd., Los Angeles, to be the registered owner, and the Beverly Finance Company, a corporation, 461 So. Western Avenue, Los Angeles, to be the legal owner."

Appellants rely for reversal of the judgment on the following propositions:

First: There was not substantial evidence to sustain the trial court's findings of fact.

Second: The trial court's finding of fact No. VII set forth supra is in conflict with the finding that Mr. Senter was not driving the automobile at the time of the accident with the implied or express consent of respondent.

Third: The trial court's conclusion of law that respondent was not liable to appellants is not supported by the findings of fact.

[2] Appellants' first proposition is untenable. The law is settled that an appellate court will not consider the question of the sufficiency of the evidence to sustain the findings of fact unless all of the evidence before the trial court is included in the record on appeal. 2 Cal. Jur.1921, 697, § 401; 1 Cal.Jur.Ten Year Supp.1936, 441; 4 C.J.S. (1937) Appeal and Error, 1675, § 1172.

[3] In the present case it is conceded that the reporter's transcript does not

contain all of the evidence before the trial court. Therefore, we are confined in our review of the case to any errors which may appear in the judgment roll.

[4] The second proposition is also untenable. Finding No. VII set forth supra is nothing more nor less than a finding that on November 16, 1936, James E. Graham executed an affidavit of repossession. It is not a finding that the facts set forth in the affidavit are true or false. It is therefore obvious that this finding that James E. Graham executed an affidavit is not in conflict with the finding that at the time of the accident in question Robert H. Senter was not driving the Plymouth automobile with the implied or express consent of respondent.

Defendant's final contention is also without merit. Section 402 of the California Vehicle Code, St.1935, p. 153, as amended by St.1937, p. 2353, reads in part as follows:

"(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

* * * * *

"(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

[5] From the facts as found by the court it appears that at all times up to and including the date of the accident respondent was the legal owner of the automobile and Grace Black the registered owner thereof. There is no finding that respondent ever repossessed the car or that Charles W. Porter acted for respondent when he repossessed the car. Therefore, under the express terms of subsection (f) of section

402 of the California Vehicle Code, respondent was not deemed to be the owner within the meaning of subsection (a) of section 402, supra, and the trial court's conclusion that respondent was not liable to appellants was supported by the findings of fact.

For the foregoing reasons the motion to dismiss the appeal is denied and the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



26 Cal.App.2d 295

BECKETT v. CITY OF PARIS DRY GOODS CO. (two cases).
Civ. 10737.

District Court of Appeal, First District,
Division 1, California.

May 10, 1938.

Attorney and client §86

An oral agreement by plaintiff's counsel on defendant's motion for new trial that plaintiff's appeal because of insufficiency of recovery would be abandoned if motion was denied did not require dismissal of such appeal on motion by defendant, in view of statute which only permitted counsel to bind his client by written agreement. Code Civ. Proc. § 283, subd. 1.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Lawrence G. Beckett against the City of Paris Dry Goods Company for damages for an alleged unlawful eviction. Judgment for plaintiff in the sum of \$677.03, both parties appeal and defendant moves to dismiss plaintiff's appeal.

Motion denied.

Dinkelspiel & Dinkelspiel and David K. Lener, all of San Francisco, for appellant.

Harry I. Stafford and Daniel R. Shoemaker, both of San Francisco, for respondent.

PER CURIAM.

Plaintiff sought damages for an alleged unlawful eviction. The action was tried without a jury, and the trial court found in plaintiff's favor, assessed his damages in the sum of \$677.03, and entered judgment accordingly. Both parties appealed. Plaintiff, claiming inadequacy of damages, took his appeal shortly after the entry of judgment; and defendant appealed after denial of its motion for a new trial on the merits. The record on appeal, consisting of the clerk's and reporter's transcripts, was filed with the clerk of this court on January 4, 1938, one-half of the cost of the preparation of which was paid by plaintiff; and on February 2, 1938, defendant filed his opening brief. Three weeks later, and on February 23, 1938, defendant gave notice of the present motion to dismiss plaintiff's appeal. The motion is based upon the claim that at the time defendant's motion for new trial came on for hearing before the trial court the judge thereof indicated that, inasmuch as both parties were apparently dissatisfied with the decision rendered, a new trial should be granted; that thereupon counsel for plaintiff stated that, if the court would deny said motion, plaintiff would abandon his appeal; and that upon such understanding defendant's motion for new trial was denied.

The motion to dismiss has been submitted on affidavits filed in behalf of the respective parties, and they are sharply conflicting as to what occurred at the time of the hearing of the motion for new trial, and particularly as to whether counsel for plaintiff made the statement attributed to him. Regardless, however, of the foregoing question of fact, subdivision 1 of section 283 of the Code of Civil Procedure declares that an attorney shall have authority to bind his client in any of the steps of the action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, "and not otherwise"; and here admittedly the alleged agreement to abandon the appeal was not in writing nor was any agreement or stipulation whatever entered upon the records of the court. The minutes recite merely that, "after hearing argument by respective counsel, it is ordered by the court that the motion of defendant for a new trial be denied." Clearly, therefore, even though it were to be found as a fact from said conflicting affidavits that counsel for plaintiff did make the statement attributed to him, plaintiff would not be bound

thereby. *McClellan v. State of California*, 119 Cal.App. 535, 6 P.2d 994. Neither of the two cases cited and relied upon by defendant, *Hibernia Savings & Loan Society v. Waymire*, 152 Cal. 286, 92 P. 645, and *Capellino v. Moore*, 207 Cal. 36, 276 P. 575, is in point, for the reason that each dealt with a written waiver of the right of appeal.

The motion to dismiss is denied.



26 Cal.App.2d 283

SPEER v. BROWN.

Civ. 1893.

District Court of Appeal, Fourth District,
California.

May 9, 1938.

Hearing Denied by Supreme Court

July 8, 1938.

1. Abatement and revival ⇨58(1)

Under the common law, an action for malpractice of a physician, although in some sort involving a contract, was treated as essentially an action based upon a personal tort and as such, as abating with the death of the physician.

2. Abatement and revival ⇨58(1)

Under statute providing for survival of an action "founded upon contract" upon death of the defendant, an action for malpractice based upon physician's alleged negligently prescribing denitrophenol in treatment of a patient for overweight, resulting in patient's partial blindness, abated upon physician's death, since action was not "founded upon contract" but was an action sounding in tort. Probate Code, § 573.

[Ed. Note.—For other definitions of "Founded on Contract," see Words & Phrases.]

3. Abatement and revival ⇨58(1)

As regards whether action based upon physician's alleged negligently prescribing denitrophenol in treatment of patient for overweight, resulting in patient's partial blindness, abated upon physician's death, the fact that the physician's professional services involved no physical contact on his part with the patient was unimportant, since it would be a "tort" to negligently prescribe

for the patient and thereby subject her to physical injury. Probate Code, § 573.

[Ed. Note.—For other definitions of "Tort," see Words & Phrases.]

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Andra Speer against N. N. Brown for injuries sustained because of alleged malpractice of the defendant. Upon the death of the defendant, a judgment of dismissal was entered, and the plaintiff appeals.

Affirmed.

J. W. Heard, Jr., and Calvin H. Conron, Jr., both of Bakersfield, and C. P. Dorr, of San Francisco, for appellant.

Borton, Petrini & Conron, of Bakersfield, and Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondent.

HAINES, Justice pro tem.

Appellant Andra Speer commenced this action against one N. N. Brown, a duly licensed physician and surgeon, claiming that he had undertaken for a consideration to treat her for overweight, and in so doing negligently prescribed for her a drug known as denitrophenol in such large doses as to result in her becoming partially blind. After appearing in the action, defendant Brown died, whereupon the attorneys who had represented him moved the court to dismiss the action by reason of his death and a judgment of dismissal was entered accordingly, from which the present appeal is taken.

The sole question for determination is whether or not an action of this description abates by reason of the defendant's death prior to trial and prior to judgment on the merits.

[1] Appellant's position is that under section 573, Probate Code, embodying the matter contained in the former section 1582, Code of Civil Procedure, all actions founded on contract survive death; that the present action is founded on contract; and that, though it incidentally sounds in tort as well, it survived the defendant's death. There is, we think, no doubt that at common-law actions of this description, though in some sort involving contracts, were treated as essentially actions based on personal torts and, as such, as abating with the death of the tort-feasor. It was said by the Su-

preme Court of the United States in *Henshaw v. Miller*, 17 How. 212, 219, 15 L.Ed. 222, that: "The maxim of the common law is 'actio personalis moritur cum persona,' and, as this maxim is recognized both in England and in Virginia, the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all torts when the action is in form *ex delicto*, for the recovery of damages, and the plea not guilty. That in case of injury to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives."

It is laid down in 1 C.J. p. 174, par. 303, that: "The true line of demarcation at common law separating those causes of action which survive from those which do not is that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are merely incidental. In the former case the cause of action survives, while in the latter it abates."

In support of these propositions authorities are cited from various jurisdictions, including *inter alia* *Stanley v. Vogel*, 9 Mo. App. 98, 99, affirmed in *Stanley v. Bircher's Ex'r*, 78 Mo. 245, as follows: "It was not at common law, nor is it under our statutes, a decisive test of the survival of an action that it arose out of contract. Actions for breach of promise of marriage never survived, unless, at least, special damage was proved, or there was immediate injury to property. It was said by Lord Ellenborough, in *Chamberlain v. Williamson*, 2 Mau. & Sel. 408: 'All injuries affecting the life or health of the deceased, all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney—all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor to maintain an action in any such case.' In *Wilson v. Tucker*, 3 Stark.N.P. 154, a *nisi prius* case, the question was not mooted. The true test as to survival against an executor was whether the cause of action had

its basis in a property right, and necessarily involved the breach of a contract obligation."

Respondent's counsel in their brief direct our attention to additional authorities from other states to the same general effect, including *Wolf v. Wall*, 40 Ohio St. 111, *Jenkins v. French*, 58 N.H. 532, and *Boor v. Lowrey*, 103 Ind. 468, 3 N.E. 151, 53 Am. Rep. 519.

There are various decisions in our own reports that present some aspects of similarity in their facts to those in the case at bar. Most of these cases have been considered by the courts with reference to the applicability in them of different provisions of the statute of limitations, or else with reference to some question as to the measure of damages. These decisions include *Basler v. Sacramento, etc., Ry. Co.*, 166 Cal. 33, 134 P. 993; *Krebenios v. Lindauer*, 175 Cal. 431, 166 P. 17; *Marty v. Somers*, 35 Cal.App. 182, 169 P. 411; *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 171 P. 98; *Kelsey v. Tracy*, 42 Cal.App. 409, 183 P. 668; *Hall v. Steele*, 193 Cal. 602, 226 P. 854; *Wetzel v. Pius*, 78 Cal.App. 104, 248 P. 288; *Kershaw v. Tilbury*, 214 Cal. 679, 8 P.2d 109; and *Huysman v. Kirsch*, 6 Cal.2d 302, 57 P.2d 908.

In *Basler v. Sacramento, etc., Ry. Co.*, supra, a husband and wife sued a street car company for injuries received by the wife while a passenger on the defendant's street car and expenses incurred in the treatment thereof. The question involved was which provision of the statute of limitations ought to be applied. The court (page 36, 134 P. page 994) said: "In such actions where, as here, the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier is the gravamen of the action, which arises *ex delicto* and not *ex contractu*. * * * Actions for damages because of the forcible ejection from a train of a passenger who was entitled to ride thereon by reason of a contract evidenced by a ticket commonly sound in tort and not in contract." And at page 37, 134 P. at page 994: "The demurrer was properly sustained for the reason that the cause of action, as pleaded, was one arising *ex delicto*; but even if we should regard it as arising upon contract, nevertheless the damages sought are directly referable to the personal injuries suffered by Mrs. Basler, and consequently the time for the commencement of the action is limited by the

terms of subdivision 3 of section 340 of the Code of Civil Procedure."

In *Krebenios v. Lindauer*, supra, the Supreme Court held that a cause of action of an employee against his employer to recover damages for personal injuries suffered in the course of his employment was one arising *ex delicto* and not based upon a breach of the contract of employment, and that the statute of limitations applicable to such action was, therefore, subdivision 3 of section 340 of the Code of Civil Procedure. In *Marty v. Somers*, supra, where a complaint in an action against a physician and surgeon had alleged the employment of the defendant by plaintiff to cure plaintiff of a certain disease, that defendant had advised an operation, which was performed, but was unsuccessful and which left plaintiff in a worse condition than before, it was held that the cause of action stated sounded in tort for damages for a wrongful act or neglect, and not for breach of contract to effect a cure and was therefore governed by the provision of the statute of limitations last referred to. The same conclusion was reached in *Harding v. Liberty Hospital Corp.*, supra, which was an action for damages against the hospital corporation, in which it was alleged that the latter had contracted to furnish plaintiff medical and surgical treatment when rendered necessary by accidental injury or disease and that the plaintiff having suffered a fracture of the leg was negligently and unsuccessfully treated by a surgeon in the employ of the hospital and as a result suffered damage. In *Kelsey v. Tracy*, supra, which was an action against a defendant as a physician and surgeon for injuries alleged to have been sustained by the plaintiffs through want of skill of the defendant in treating them, it was again held that the action sounded in tort and that the time within which it might be brought was limited by subdivision 3 of section 340, Code of Civil Procedure. *Hall v. Steele*, supra, was an action wherein it was alleged that plaintiff had consulted with the defendant, believing defendant to be a surgeon and dermatologist and the defendant represented to plaintiff that by removing a small strip of skin from plaintiff's lower lip said lip would be narrowed without its shape being changed, so that said lip would then correspond with the face of plaintiff in general and add largely to the harmony of plaintiff's features, thereby increasing her eligibility for employment as a moving picture actress, in consequence of which plaintiff employed de-

fendant to perform the operation, which was so unskillfully done that plaintiff was thereby permanently disfigured. The court said, page 605, 226 P. page 855, that from the averment of the plaintiff's complaint "it indubitably appears that the action is one sounding in tort the gravamen of which is the alleged negligent and unskillful performance of a surgical operation; and that whatever is said therein as to the engagement of the defendant as a surgeon and dermatologist to perform said operation, and as to representations made by the defendant as to the probable effect of said operation upon the plaintiff's features, are to be considered as mere matters of inducement to the main cause of action and not as averments of the breach of a contractual relation forming the basis of the present action." It is also said that: "In an ordinary action for malpractice the physician or surgeon is not to be held as a warrantor of cures or of consequences other than those arising from a breach of his duty to skillfully perform the operation, and if, as the individual cases show, through no unskillfulness on the part of the surgeon, the plaintiff's broken arm was permanently impaired, * * * or the patient's nervous system shattered, * * * or if the patient fails to recover, * * * or even if, as in this case, the facial expression of the plaintiff is altered to an extent amounting to a disfiguration, the plaintiff cannot recover in this form of action without being able to show that the specific operation which the surgeon was engaged to perform was negligently and unskillfully performed."

In *Wetzel v. Pius*, supra, which was again an action against a physician and surgeon for damages for malpractice, the court said (pages 106, 107, 248 P. page 289): "Actions of this character are not based upon the contract of employment; they sound in tort, and are classed as actions *ex delicto*. In discussing a similar contention, our Supreme Court said: 'The contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action *ex delicto*.'" Citing *Denning v. State*, 123 Cal. 316, 55 P. 1000, and sundry

of the cases to which we have already referred.

In this case also the question involved had to do with the statute of limitations applicable, which the court held was subdivision 3 of section 340, Code of Civil Procedure. *Kershaw v. Tilbury*, supra, was an action for damages for malpractice, it being alleged that the defendants represented themselves as physicians who could and would cure plaintiff from a bone infection, in consequence of which they were employed to treat her, but that, instead of using any standard method of effecting a cure, they used other methods whereby they negligently caused the infection to spread, to plaintiff's great injury and damage. The court said (page 689, 8 P.2d page 113): "From the averments of the complaint it appears that the action is one sounding in tort, the gravamen of which is the alleged negligence and unskillful performance of the treatment of the child, and that whatever is alleged therein as to the engagement of the defendants as physicians to treat plaintiff, and as to representations made by defendants regarding the probable effect of said treatment, are to be considered as mere matters of inducement to the main cause of action and not as averments of the breach of a contractual relation forming the basis of the action. This is the holding in *Hall v. Steele*, 193 Cal. 602, 226 P. 854."

Huysman v. Kirsch, supra, was, again, an action for malpractice wherein the Supreme Court (page 306, 57 P.2d page 910) said: "It is the settled law in this state that an action by a patient against a physician and surgeon for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury."

In this last case the limitation, however, was held to be inapplicable under the facts because the operation involved a series of acts and had not been completed at a sufficiently early time to make the action too late.

Appellant's counsel cannot, of course, question the binding force of the various decisions of our courts to which we have thus at some length referred, but they seek to distinguish them all from the instant case. Such of them as involve the statute of limitations are said merely to be "au-

thority for the position that notwithstanding the fact that a contract is involved, the primary recovery sought is for injury to the person," and of them it is said that their reasoning is sound because the statute prescribing a one-year limitation for actions for injuries to the person (section 340, subd. 3, Code Civ.Proc.) "does not except injuries to the person arising from contracts." It is also claimed that they are, in the main at least, distinguishable from the case at bar because, for the most part, the physician's contact with the person was in some degree physical "such as manipulating a bone or operation with a knife," whereas that feature is absent here.

As warranting these asserted distinctions, reliance is placed on the three California cases of *Vragnizan v. Savings Union, etc., Co.*, 31 Cal.App. 709, 161 P. 507; *Crawford v. Duncan*, 61 Cal.App. 647, 215 P. 573; and *Singley v. Bigelow*, 108 Cal.App. 436, 437, 291 P. 899.

Vragnizan v. Savings Union, etc., Co. involved a situation in which a husband against whom a divorce suit had been filed, by fraudulent representations and concealments respecting the amount of the community property, had effected an unfair property settlement with his wife and subsequently died. She presented a claim against his estate for the amount of which she claimed to have been thus defrauded, and on its being rejected sued for the sum involved. The court there said (pages 711, 712, 161 P. page 508): "It is sometimes said that at common law all causes of action ex contractu survive, whereas all those based on tort die with the person. But neither of these statements is strictly accurate. As to the former, for example, a breach of promise of marriage is an action arising ex contractu; yet it does not survive. Nor do all actions in tort die with the person. The true test is not so much the form of the action as the nature of the cause of action. When the action arises out of a tort, unconnected with contract, and which affects the person only, and not the estate—such as assault and battery, false imprisonment, malicious prosecution, personal injuries—the action is purely personal, and abates with the death of the wrongdoer. But when the action is virtually founded upon contract, though nominally in tort, it survives against the tort-feasor's legal representatives."

In the further course of its opinion the court quoted from *Henderson v. Henshall*,

9 Cir., 54 F. 320, 4 C.C.A. 357, to the effect that "there may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code [of California] passes to the personal representatives of the deceased." In this Vragnizan Case the court concluded that the cause of action did not die with the husband.

In *Crawford v. Duncan*, supra, the plaintiff had consulted the defendant, a physician and surgeon, with reference to swollen glands on the side of her neck. She was particularly desirous of having the swelling so treated that no scar would result. This was fully explained to the doctor who, according to the plaintiff's evidence, planned to give her radium treatments rather than to conduct an open operation, and absolutely assured her that no scar would result, in reliance upon which she submitted to the treatment, which in fact produced a permanent disfigurement. In determining the question what statute of limitations was applicable, the court said (page 574): "This is not an action of tort; that is, it is not an action for malpractice based upon negligence. It is an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar. It is subdivision 1 of section 339 of the Code of Civil Procedure, therefore, and not subdivision 3 of section 340 of that Code, which is applicable; and the statute of limitations did not run until the expiration of two years from the time when plaintiff's cause of action accrued."

Singley v. Bigelow, supra, was a case wherein a druggist sold the wrong drug to a woman who was injured by using it. The druggist having died, the injured woman and her husband presented a claim against his estate for the damages resulting from her injuries and the expense of treating them and on its rejection brought action against his executrix thereon. The question to be decided was whether the druggist's death had put an end to the cause of action. The trial court sustained a demurrer to the complaint and its action in doing so was upheld by the Appellate Court for the Third District. However, the court (page 441, 291 P. page 901) discussed *arguendo* various decisions, including *Conklin v. Draper*, 229 App.Div. 227, 241 N.Y.S. 529, and

Frankel v. Wolper, 181 App.Div. 485, 169 N.Y.S. 15, in which a different doctrine from any to which we have thus far adverted was advanced, that is, as expressed in *Conklin v. Draper*, that: "Two or more causes of action may arise out of the same transaction with different statutes of limitations, and although one may be barred, the other may be good," and that, "while the plaintiff may not be able to recover for malpractice, she may recover for a breach of contract"; or, as said in *Frankel v. Wolper*, that after the statute of limitations had run against the tort, "recovery of damages could not be had for the wrong involving unskillful treatment; but plaintiff might be entitled to recover sums paid to defendants on the contract to furnish proper medical aid, and for sums paid out for nurses and medicines or other damages that flow naturally from the breach of whatever contract was made between the parties." As respects these two New York cases, the court in *Singley v. Bigelow* went on to conclude that: "A reference to the opinion in the *Wolper Case*, supra, discloses that the court set forth a rule of decision which we think is applicable here, as we shall hereafter state. We refer to the following: 'That where a physician, with whatever prudence, agrees that his treatment will cure, and it does not, the patient is absolved from payment, may recover advances, may recover expenditures necessitated for nurses and medicines, and maybe for something else. But such are not the damages stated here. If the complaint otherwise permitted a conclusion that the action was on contract, the misstatement of damages need not disturb it. But here the damages alleged are unsuited to an action on contract, and help to characterize the complaint as one for malpractice and negligence.' These cases are authority only to the effect that actions *ex contractu* may be maintained against the estate of the deceased wrongdoer, but the actions must be brought in that form, and based upon a violation of contract, and not actions prosecuted as actions *ex delicto* based upon a tort."

We are unable to find anything in *Vragnizan v. Savings Union, etc., Co.*, supra, or in *Singley v. Bigelow*, supra, that can furnish any aid to appellant here. What was involved in the *Vragnizan Case* was purely a property dispute such as under the rule laid down in the passage from 1 C.J. 174, quoted in an earlier part of this opin-

ion, would not be affected by the tortfeasor's death. The decision in the Singley Case was against the survival of the action, and the conclusion there reached as to the significance of the New York cases referred to would militate to the same degree and in the same manner as against the survival of the cause of action relied on in the instant case as it did against the survival of the cause of action which the court was there considering. If it be true, as there suggested, that "actions *ex contractu* may be maintained against the estate of the deceased wrongdoer, but actions must be brought in that form, and based upon a violation of contract and not (be) actions prosecuted *ex delicto* based upon a tort," then we are bound to observe that the plaintiff's case in the action at bar falls within the inhibition, for an inspection of her pleadings will disclose that her reliance in framing them was clearly and distinctly placed on the defendant's *negligence*.

It remains to discuss the bearing of *Crawford v. Duncan*, *supra*, in which a hearing was denied by the Supreme Court. There, as here, the cause of action was held not to be barred by the statute of limitations applicable to torts because of a very express warranty by the physician of the result of his proposed treatment. There may be some difficulty in distinguishing this case upon its facts from the case of *Hall v. Steele*, *supra*, in which, notwithstanding the defendant's representations about the effect of her proposed treatments, it was held that no warranty existed. In the last-mentioned case it was decided, however (page 606, 226 P. page 856), that the distinction did exist in view of what in it was said to be "the state of the pleadings, which sound in tort and count upon an alleged unskillful surgical operation," after which the Supreme Court went on to say that: "A different issue involving this very question would have been presented if the action had been one for the breach of warranty as to the result of the operation performed."

So far as the case at bar is concerned, there is, of course, no claim of any warranty at all and therefore, so far forth, it would fall into the class in which *Hall v. Steele* was held to fall, rather than into that represented by *Crawford v. Duncan*.

[2] In fine, we do not think that appellant's contentions are aided by any of the

authorities above referred to. This does not, however, really dispose of the main point made by him, which is not in terms discussed in any of the cases: that is, that whatever may be the application of the statute of limitations to bar actions sounding in tort, even though arising out of services rendered under contract, our statute governing the survivorship of causes of action (Probate Code, § 573) is a different and distinct statute and provides that *all* actions founded upon contracts shall survive regardless of whether they also sound in tort or not, and, therefore, that in applying *this* statute it does not at all matter whether the gravamen of the action is negligence or not; that, even if it be negligence, the action still involves a negligent breach of a contract and therefore ought to be held to be "founded on contract" and to survive. To uphold this contention, however, would be to refuse to apply to the construction of the words "founded upon contracts" as used in the statute, such announcements by the courts as, for example, that already quoted from *Hall v. Steele*, *supra*, indicating that ordinarily speaking, allegations respecting the employment of a physician are "mere matters of inducement to the main cause of action" and that allegations that he acted negligently are not "averments of the breach of a contractual relation forming the basis" of the action. We think, in other words, that to uphold the contention which appellant now makes would tend to break down and obscure a distinction between causes of action "founded upon contracts" and causes of action "sounding in tort" that the courts in this state, in the long line of decisions that we have discussed, have pretty consistently maintained, and we, therefore, find ourselves unable to uphold it.

[3] We may add that the suggestion made that in the instant case the decedent's professional services to appellant involved no physical contact on his part with her appears to us unimportant. It was as much a tort to negligently prescribe for her and thereby subject her to physical injury as it would have been to have negligently operated upon her.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

**SANTA YNEZ MERCURY CORPORATION,
Limited, v. SUPERIOR COURT IN AND
FOR SANTA BARBARA COUNTY et al.**

Civ. 11780.

District Court of Appeal, Second District,
Division 2, California.

May 9, 1938.

Hearing Denied by Supreme Court

July 8, 1938.

Prohibition ☞3(5)

Prohibition will not lie to restrain proceedings on an order appointing a receiver, since authority to appeal from an order appointing a receiver and to file an undertaking staying all proceedings on the order pending determination of the appeal on its merits constitutes a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ.Proc. §§ 943, 963, subd. 2, 1103.

Prohibition by the Santa Ynez Mercury Corporation and others against the Superior Court of the State of California in and for the Santa Barbara County and others, to restrain further proceedings on an order appointing a receiver and to restrain further proceedings in a pending action.

Writ denied.

Howard & Littlefield, Frederick L. Howard, Jr., and Forrest E. Littlefield, all of Hollywood, for petitioners.

Fred A. Shaeffer, of Santa Maria, for respondents.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain (a) all further proceedings upon an order of the respondent superior court appointing a receiver for petitioner corporation, and (b) all further proceedings in an action now pending before the superior court of Santa Barbara county entitled *Oscar E. Hanno et al., Plaintiffs, v. Santa Ynez Mercury Corp., et al., Defendants*, No. 29421. Respondents have filed a demurrer to the petition.

The essential facts are:

February 7, 1938, Oscar E. Hanno and Mrs. Harry Houser, as plaintiffs, filed an action in the superior court in and for the county of Santa Barbara, naming Santa Ynez Mercury Corp., Limited, and Hans Peters and William Peters as de-

fendants. Paragraph IX of the complaint alleged:

"That dissension has arisen in the Board of Directors, which said board consists of four members, as hereinabove mentioned whom the plaintiffs are two, and the defendants Hans Peters and William Peters the other two. That because of the dissension, mutual hostility and distrust of the directors toward each other, no business of the corporation has been transacted by said corporation during the past year, nor is it possible because of the distrust and dissension of the Board of Directors for them to transact any business of the corporation, or to elect any person to act as manager or to give any person authority or power to transact business for said corporation."

Thereupon respondent superior court appointed respondent McCloskey receiver of the Santa Ynez Mercury Corporation's property and on February 17, 1938, made an order directing said corporation to deliver all of its property to James M. McCloskey as receiver.

February 18, 1938, defendants in said action, petitioners herein, filed a demurrer to the complaint and a motion for change of venue to Los Angeles county. On February 28, 1938, the motion for change of venue was called for hearing before respondent court, sitting in the city of Santa Barbara, which refused to entertain the motion for the reason that, since plaintiffs' attorney resided in the city of Santa Maria the motion under the rules of the superior court of Santa Barbara county should have been noticed before the department of the superior court sitting in Santa Maria.

This is the sole question necessary to determine:

Do petitioners have a plain, speedy, and adequate remedy in the ordinary course of law?

This question must be answered in the affirmative. It is the settled law of California that since an appeal lies from an order appointing a receiver, section 963, subsec. 2, Code Civ.Proc., and an undertaking may be given staying all proceedings upon said order pending the determination of the appeal upon its merits, section 943, Code Civ.Proc., this procedure constitutes a plain, speedy, and adequate remedy in the ordinary course of law within the meaning of section 1103 of

the Code of Civil Procedure. *Jacobs v. Superior Court*, 133 Cal. 364, 365, 65 P. 826, 827, 85 Am.St.Rep. 204; *Pacific Broadcasting Co. v. Superior Court*, 100 Cal.App. 649, 650, 280 P. 991.

In *Jacobs v. Superior Court*, supra, Mr. Justice McFarland, at page 364 (at page 826 of 65 P.) says:

"This is an original petition here for a writ of prohibition to arrest all further proceedings upon a certain order of the respondent, the superior court, appointing a receiver.

* * * * *

"* * * But, without examining into these questions, or determining whether or not the appointment of the receiver was proper, and authorized by law, it is sufficient to say that this petition for prohibition cannot be sustained, because petitioners have 'a plain, speedy, and adequate remedy in the ordinary course of law,' within the meaning of section 1103 of the Code of Civil Procedure. [Citing cases.]

"* * * The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal."

In *Pacific Broadcasting Co. v. Superior Court*, supra, at page 650 (at page 991 of 280 P.) the court says:

"Furthermore, the following cases hold that since under the amendment to the Code in 1897 (St.1897, pp. 55, 56), an appeal may be taken from an order appointing a receiver and an undertaking given to stay the operation of the order pending the appeal, the remedy of prohibition will not lie, notwithstanding the question of jurisdiction to make the order may be involved: *Jacobs v. Superior Court*, 133 Cal. 364, 65 P. 826, 827, 85 Am.St.Rep. 204; *Campbell v. Superior Court*, 67 Cal.App. 728, 228 P. 354; *Lieberman v. Superior Court*, 72 Cal.App. 18, 236 P. 570."

Therefore, since the law is settled that a writ of prohibition will not issue where petitioner has a plain, speedy, and adequate remedy in the ordinary course of law (section 1103, Code Civ.Proc.; 21 Cal. Jur.[1925] 584, § 5; 9 Cal.Jur. Ten Year Supp.[1936] 549, § 5), the application for a writ of prohibition in the instant case should be denied.

Relative to the motion for change of venue, the respondent superior court has not ruled upon the same, but may be required to do so at any time by petitioner's

noticing the motion for hearing before the proper department of the superior court of Santa Barbara county designated in the rules of that court.

Our conclusions make it unnecessary for us to pass upon the various other points discussed by counsel.

The demurrer to the petition is sustained, the application for a writ of prohibition is denied, and the alternative writ heretofore issued is discharged.

We concur: CRAIL, P. J.; WOOD, J.



26 Cal.App.2d 297

PEOPLE v. UNITED CAPITAL CORPORATION.

Civ. 10723.

District Court of Appeal, First District,
Division 2, California.

May 10, 1938.

1. Appeal and error ⇨761

Court rules requiring that the brief must present each point separately under an appropriate heading showing nature of question to be presented or the point to be made were not complied with where opening brief contained no heading except heading "Appellant's Opening Brief" and stated at conclusion that certain findings were unsupported by evidence. Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2.

2. Nuisance ⇨84

In proceeding to abate a partially burned dwelling as public nuisance, evidence held sufficient to support material findings and to warrant abatement of structure as a public nuisance. Code Civ.Proc. § 731.

3. Nuisance ⇨85

In proceeding to abate a nuisance, where it was shown that building was dilapidated, unsafe, and unsanitary, which condition had continued over long period of time, trial court might properly have made an unconditional order for demolition of building, and hence defendant could not complain of a conditional order requiring

demolition only in event owner failed to comply with building, health, and fire laws within 30 days. Code Civ.Proc. § 731.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Proceeding by the People against the United Capital Corporation, a corporation, to abate a nuisance. From a judgment ordering defendant to abate a certain nuisance, defendant appeals.

Affirmed.

A. A. Tiscornia, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Edmund P. Bergerot and Thomas P. Slevin, Deputy City Attys., all of San Francisco (Walter E. Trefts, Jr., of San Francisco, of counsel), for the People.

SPENCE, Justice.

This action was brought to abate a public nuisance, and defendant appeals from an adverse judgment.

The alleged nuisance consisted of an old dwelling which had been partially burned in 1929 and had remained unoccupied for many years. In 1935, the board of supervisors, upon recommendation of the police department, the health department, and the bureau of fire prevention declared the building to be a public nuisance and directed that this action be brought under the provisions of section 731 of the Code of Civil Procedure. The trial court found all of the allegations of the complaint to be true and ordered that "defendant shall forthwith comply with all the existing building, health and fire laws, ordinances and statutes within a period of thirty days from the date hereof, and in the event said conditions are not complied with within the above stated time, that said defendant shall then and there forthwith remove and demolish every portion of the building * * *."

[1] The opening brief of appellant wholly fails to comply with the provisions of rule VIII, section 2, of the Rules of the Supreme Court and District Courts of Appeal, which requires that the brief "must

present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." Said brief contains no headings whatever except the heading "Appellant's Opening Brief" and said opening brief is the only brief which appellant has filed.

At the conclusion of said brief, appellant states: "Therefore, appellant believes that the findings and judgment were largely unsupported by the evidence; and contends further that rather than ordering the building to comply with all building, health and fire laws, which would put it in condition for occupancy, the court should only have ordered appellant to eliminate certain nuisance features, by possibly sealing sewer traps, fixing certain rain gutters on the roof, removing boards affected with termites, and thoroughly boarding up any openings in the building." We will assume that these are the points which appellant desires to raise on this appeal.

[2, 3] We find no merit in either of the points raised by appellant. A review of the record shows that there was ample evidence to support all of the material findings and to warrant the abatement of the structure as a public nuisance. As said evidence supported the trial court's findings which showed a situation similar to that presented in *People v. Foerst*, 10 Cal.App.2d 274, 51 P.2d 455, appellant's first point may be disposed of upon the authority of that case. In view of the extremely dilapidated, unsafe, and unsanitary condition of the building, which condition had been permitted to exist over a long period of time, the trial court might properly have made an unconditional order for the demolition of the building rather than the conditional order which provided for demolition only in the event that appellant failed to comply with the building, health and fire laws within thirty days. Appellant may not therefore complain that the trial court did not go further and order demolition only upon failure "to eliminate certain nuisance features."

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

26 Cal.App.2d 272

UCOVICH v. BASILE.

Civ. 10527.

District Court of Appeal, First District,
Division 2, California.

May 9, 1938.

Hearing Denied by Supreme Court

July 8, 1938.

1. Appeal and error ⇨927(3)

On appeal from judgment of nonsuit in action for conversion of personalty, the reviewing court would accept plaintiff's testimony that a certain instrument, relied on to show that defendant had promised to pay a stated sum on plaintiff's mortgage debt before he would be entitled to personalty in connection with exchange of deeds, was signed and executed by both parties on day when they exchanged deeds.

2. Exchange of property ⇨4

A contract, whereby plaintiff agreed to convey described realty and certain personalty by a good and valid grant deed to defendant subject to listed encumbrances and to accept a good and valid grant deed to described realty owned by defendant, was unambiguous and could not be construed by the court.

3. Frauds, statute of ⇨118(1)

A contract, whereby plaintiff agreed to convey described realty and certain personalty by a good and valid grant deed to defendant subject to listed encumbrances and to accept a good and valid grant deed to described realty owned by defendant, could not be construed together with a subsequently prepared document which was signed by neither party, since as a contract evidencing an exchange of realty document did not meet the requirements of the statute of frauds. Civ.Code, § 1642.

4. Exchange of property ⇨4

A contract, providing that plaintiff and defendant would exchange described realty subject to existing encumbrances and containing no promise by either party to pay any money to the other on those encumbrances, could not be construed by reading it together with document allegedly executed on day when parties exchanged deeds providing that defendant would pay \$5,000 on plaintiff's mortgage debt, since the instruments were antagonistic. Civ.Code, § 1642.

5. Contracts ⇨164

Two antagonistic instruments on the same subject may not be read together, but must be read separately, and the later in

date will supersede the earlier instrument if it is valid. Civ.Code, § 1642.

6. Exchange of property ⇨5

An agreement to modify a contract to exchange deeds could not modify contract where agreement was not supported by any consideration.

7. Exchange of property ⇨7

A defendant who took possession of personalty under contract to exchange deeds, personalty, and mineral rights was not guilty of conversion of personalty for failure to pay \$5,000 on plaintiff's mortgage debt before taking possession, where contract to exchange deeds contained no provision requiring defendant to pay that sum, and a modifying agreement requiring defendant to pay sum was not supported by any consideration.

Appeal from Superior Court, Santa Clara County; Maurice T. Dooling, Judge.

Action by M. Uovich against J. Basile, Jr., for damages for the conversion of personalty. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, and Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellant.

Louis Oneal, Maurice J. Rankin, and C. E. Luckhardt, all of San Jose, for respondent.

STURTEVANT, Justice.

The plaintiff sued the defendant to recover a judgment in the sum of \$5,000 as damages. The defendant answered and a trial was had before the trial court sitting with a jury. At the end of the plaintiff's case the defendant made a motion for a nonsuit. The motion was granted. From the judgment of nonsuit the plaintiff appealed.

In pleading his case the plaintiff set forth his claim in two counts. In the first count he pleaded the facts; in the second count he set forth an ordinary count for conversion of personal property. In the first paragraph of the first count he alleged: "That on or about the 18th day of February, 1931, at San Jose, California, the plaintiff and defendant entered into a written agreement for the exchange of certain real property, by the terms of which plaintiff was to exchange certain real property belong-

ing to him, situate in the county of Butte, state of California, for an undivided interest belonging to said defendant in certain real property situate in the county of Tehama, state of California. That plaintiff agreed, as part of said agreement of exchange, to assign and transfer to defendant certain farm equipment, drying-plant equipment including trays, and boxes, tractors, and ranch tools, when said defendant should pay to the bank holding deed of trust upon the said property of plaintiff in Butte county the sum of five thousand (\$5000.00) dollars on account of the principal of said indebtedness to said bank, and said defendant then and there agreed to make said payment in the sum of five thousand (\$5000.00) dollars to said bank in consideration of the transfer of said personal property to be made to him. That said agreement was, during the month of February, 1931, reduced to writing in three separate documents, a copy of each of said documents, marked respectively Exhibit 'A,' Exhibit 'B' and Exhibit 'C,' being hereto attached and made a part hereof, and that said documents were all made and delivered as part of the same transaction and to constitute the evidence of one agreement." Continuing, he alleged the neglect and refusal of the defendant to pay the bank \$5,000 and that plaintiff was compelled to pay said sum; that defendant took possession of said personal property and still holds such possession; and that plaintiff has been damaged in the sum of \$5,000, together with interest from February 28, 1931, at 7 per cent. per annum.

[1-6] Exhibit A in part is as follows:

"M. Ucovich first party, hereby offers to convey by a good and valid grant deed to Jo. Basile Jr. Second party, the following real property owned by the first party in the county of Butte state of California, described as follows: The north half of the N. E. Quarter (N- $\frac{1}{2}$ of N. E. $\frac{1}{4}$) Section 35 Township 18 North, Range 2 East. M. D. B. & M. 80 acres, more or less. Including all ranch equipment, and dry plant equipment such as trays and boxes, 3 tractors, all implements and tools of every description on said ranch. Subject to the following encumbrances: \$30,000—The sum of \$5000.00 of this above \$30,000 is now due. Subject to a reclamation and drainage tax of record which is not to exceed \$3,200.00 and accept therefor a good and valid grant deed to the following property owned by the second party situate in the county

of Tehama state of California, and described as follows: An undivided $\frac{1}{2}$ interest in 8230 acres, more or less, located about 20 miles west of Red Bluff and known as the Pettijohn Ranch. Located in Township 26 N. R. 6 W. M. D. B. & M. Frank Temple of San Jose, California is the owner of the other undivided $\frac{1}{2}$ interest in the above ranch.

"All mineral rights of every description reserved. Subject to the following encumbrances: \$24,400 Additional Terms of Exchange: All interest, taxes and all expenses appertaining to either property, to be pro-rated at date of transfer. Also Insurance. * * * The parties hereto accept this above exchange and hereto set their hands.

"Dated: Feb. 18th, 1931.

"M. Ucovich

"Acceptance

"Joe Basile, Jr. second party, hereby accepts the foregoing offer and agrees to perform the terms and conditions thereof on his part and consents to the employment of _____ as agent for both parties and agrees to pay to him commission of \$_____. Dated: Feb. 18, 1931.

"Joseph Basile Jr."

The plaintiff does not claim that by virtue of any covenant contained in Exhibit A the plaintiff agreed to execute a bill of sale nor that the defendant agreed to pay the bank any sum whatever. However, he earnestly contends that such matters appear when Exhibits B and C are read in connection with Exhibit A. True it is that Exhibit A contained a covenant to prorate interest, taxes, insurance, etc., but it did not provide for a written instrument on that subject. Nevertheless, after February 18, 1931, a prorate statement, Exhibit B, was written. In form that document is as follows: "Pro-rata statement as of February 28, 1931 covering Ucovich Ranch at Gridley, Calif. Undivided $\frac{1}{2}$ interest in Basile Ranch near Red Bluff." (Then follow items of insurance, prorated, taxes prorated.) That document ends as follows:

"Note: Have written to Sutter Butte Canal Company for bill on Ucovich property. Closing bills also should be gotten on light, power, telephone, etc. The above to be adjusted later. How about personal property taxes on Ucovich Ranch? Also rent due Joe on his ranch." It may be noted that said Exhibit B contains nothing regarding a bill of sale to be executed by

the plaintiff nor regarding the payment of \$5,000 by the defendant. Exhibit B was not signed by either party. The plaintiff testified that an amended pro rata statement, Exhibit C, was executed and signed by both parties. He claims it was so executed the day the parties exchanged deeds. It was the earnest contention of the defendant that no such document was ever written or executed. However, as we are considering the ruling on a motion for a nonsuit we will accept the plaintiff's testimony. The title to Exhibit C was, "Pro-rata statement as of February 28, 1931. Covering Ucovich Ranch at Gridley, Calif. an undivided $\frac{1}{2}$ interest in Basile's ranch near Red Bluff, Calif. Subject: \$5000 due to the Capitol National Bank of Sacramento, Calif. And bill of sale, otherwise final." (Then follow the identical items in the identical language contained in Exhibit B.) This document, however, contains this additional matter:

"Ucovich is to pay Sutter Butte Canal Company lights and telephone bills. The personal property covered by bill of sale on Ucovich Ranch as soon as Basile pays \$5000 to the bank, the sale will take effect. The taxes are already pro-rated above, as to the rents on Joe. Ranch and the crop on Ucovich, Ranch one is to upset the other. Ucovich is to get rents if any and Joe the crops.

"[Signed] M. Ucovich

"[Signed] Joseph Basile Jr."

In other words, Exhibit C is a copy of Exhibit B, but the portion in italics is added. The original of Exhibit C the plaintiff claimed was lost and he attempted to prove a copy. As stated above, it is his claim that Exhibits A, B, and C should be read together and construed as one contract. However, it is clear that cannot be done. In the first place, Exhibit A is, standing alone, a full and complete contract. The plaintiff claims the phrase "subject to the following encumbrance" is ambiguous. But we cannot agree with him. The phrase has a well-defined meaning. *Andrews v. Robertson*, 177 Cal. 434, 170 P. 1129; *Keeler v. Murphy*, 117 Cal.App. 386, 390, 3 P.2d 950, 951, 952. The plaintiff cites no authority supporting his claim and we know of none. As the document is not ambiguous no construction is allowable. In 13 C.J. 520, the author says: "Further a court will not resort to construction when the intent of the parties is expressed in clear and unambiguous language, but will enforce the contract according to its terms." If Ex-

hibit A were ambiguous, but it is not, then several *contracts* relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. Civ.Code, § 1642. Exhibits B and C each stand on a separate basis. After Exhibit A had been executed by the parties, the plaintiff testified that the defendant directed him to take up further detail with Miss Hymson. She is the secretary of Mr. Holman, who has an office in the Russ building in San Francisco. The plaintiff gave her certain data and perhaps she received other data from the defendant. She held no written contract from either party. She prepared the document Exhibit B. It was not signed by either of the contracting parties. As a contract evidencing an exchange of real estate it did not meet the requirements of the statute of frauds. 11 Cal.Jur. 7; *Keeler v. Murphy*, 117 Cal.App. 386, 3 P.2d 950. Therefore Exhibit B could not be used as a coordinate instrument throwing light on Exhibit A. Exhibit C, the plaintiff claims, was made up in the same manner as Exhibit B. He asserts that it was also prepared by Miss Hymson. He testified that one or two days after February 28, 1931, pursuant to appointment he went to the office of Mr. Holman for the purpose of exchanging title deeds and closing the deal. On arriving at that office he and the defendant exchanged deeds. While in the office he claims Exhibit C was signed by the plaintiff and defendant in duplicate; that he received one copy and the defendant received the other copy. The record does not show whether it was his claim that Exhibit C was delivered before the title deeds were exchanged or afterwards. Furthermore, Exhibit A distinctly provides that each party will exchange his property (designating it) to the other subject to existing encumbrances and no promise was made by either to pay any moneys to the other party or on said encumbrances. Exhibit C contains provisions to the effect that the defendant would pay on the plaintiff's mortgage debt \$5,000. The two documents conflict. Under such circumstances the latter will not be read with the former in construing it. *Kunz v. Anglo & London Paris Nat. Bank*, 214 Cal. 341, 349, 5 P.2d 417, 420; 12 Am.Jur. 783, 784; *Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 A. 471, 5 L.R.A., N.S., 1105, 1111, 1112, 115 Am.St.Rep. 354; *Huyler's v. Ritz-Carlton Restaurant & Hotel Co.*, D. C., 1 F.2d 491, 492. Being antagonistic, the two instruments are not to be read together, but separately, and the

last in date will, if it is valid, supersede the earlier instrument. 6 Cal. Jur. 300, Contracts, § 181. But, although Exhibit C, the last instrument executed by the parties, was an agreement to modify Exhibit A, it lacked a material element to make it a contract. There was no consideration to support it. That fact was stipulated to in open court. Hence, as a modifying contract, it was of no help.

[7] Turning back to the body of the complaint and comparing its allegations with the contract as proved, it is noticed at once that there was no proof of the material allegations of plaintiff's complaint. The proof did not show or tend to show an act of conversion on the part of the defendant, but, on the contrary, it showed that he obtained title to the articles of personal property under a valid and enforceable contract of exchange. It is therefore clear that the trial court did not err in granting defendant's motion for a nonsuit.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



JOHNS v. SCOBIE. *

Civ. 2206.

District Court of Appeal, Fourth District,
California.

May 6, 1938.

Hearing Granted by Supreme Court
July 5, 1938.

1. Pleading ⚡381(1)

That merely probative facts are not pleaded is no obstacle to proving them if they are relevant to the issues that are pleaded.

2. Trial ⚡105(2)

In action by grantee against deceased grantor's administratrix for reformation of deed so as to include entire tract of land owned by grantor, where administratrix testified, without objection thereto, that grantor's only heirs were five nieces and nephews including administratrix and grantee, and no evidence was introduced to the contrary, administratrix' testimony was taken

as true, in so far as it affected grantee's right to acquire title to the land by adverse possession.

3. Descent and distribution ⚡74

The title to all of the estate of an intestate vested in his heirs at law, whether known or unknown, at the moment of his death. Probate Code, § 300.

4. Tenancy in common ⚡3

Where an intestate died possessed of realty, leaving five nephews and nieces, they became, upon intestate's death, tenants in common with each other.

5. Tenancy in common ⚡10

The dominant attribute of a "tenancy in common" is that the cotenants hold the common land by unity of possession, for which reason there can be no specific or determinate portion of the common land which any one of such tenants can claim as his in severalty. Civ. Code, §§ 685, 686.

[Ed. Note.—For other definitions of "Tenancy in Common," see Words & Phrases.]

6. Tenancy in common ⚡21

A tenant in common of the undivided interest in the common property is entitled to possession of the whole thereof as against all persons except his cotenants, and each tenant has the right to enter upon and occupy the whole and every part of the common lands.

7. Tenancy in common ⚡21

A tenant in common has no right to exclude his cotenant from any portion of the common lands.

8. Tenancy in common ⚡15(2)

The possession of one cotenant is possession for all, and each has a right to assume that the possession of his cotenant is his possession, until informed to the contrary, either by actual notice or by acts and declarations which may be equivalent to notice.

9. Tenancy in common ⚡15(2)

Until a tenant in common has notice, either actual or constructive, in some form that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, whatever may have been the actual intent of the cotenant in physical possession.

10. Adverse possession ⚡4

Even if there be an actual adverse holding of realty by one heir of a decedent

*For subsequent opinion see 86 P.2d 820.

against other heirs who are his cotenants, accompanied by such notice as, in due time, to invest him as against them with a title by adverse possession, the acquisition of such title is no ouster of the estate nor does it free the heir who has gained it from holding in subordination to the estate.

11. Adverse possession ⇨4

An heir can lose his interest by the adverse possession of a coheir just as he can convey his interest by deed, but the person who takes it by such adverse possession under the statute takes it subject to administration in the same manner that a grantee would.

12. Adverse possession ⇨4

Title by adverse possession cannot be acquired by an heir or devisee against the administrator or executor.

13. Adverse possession ⇨62(2)

The administrator's or executor's possession will never be construed as possession in hostility to the heir or devisee, and possession of the heir or devisee, while the estate is in course of administration, will never be construed to be in hostility to rights over that property with which the law clothes the estate.

14. Adverse possession ⇨4

Under the rule that an heir or devisee cannot gain title by adverse possession against the estate, it is immaterial whether administration has been instituted or delayed until after the lapse of five years during which the adverse possession has continued.

15. Adverse possession ⇨4

Delay in instituting probate proceedings or their suspension after being instituted cannot place an heir in the position of a stranger to the decedent's title so as to enable the heir to acquire title by adverse possession.

16. Adverse possession ⇨114(1)

Evidence that nephew and uncle lived together on uncle's land, that, after uncle died intestate, nephew continued to live on the land for many years, that nephew built large dwelling on the land, and that uncle had left four other nephews and nieces as heirs, *held* not to show that the nephew acquired exclusive title to the land by adverse possession as against the other heirs.

17. Deeds ⇨56(2)

There can be no delivery of a deed without an intention to deliver it in the sense of parting with control.

18. Deeds ⇨208(3)

Evidence that uncle and a nephew, who lived together and owned adjoining tracts of land, each executed a deed of his own tract to the other, so that each would own the other's tract in case of death of one, that deeds were not recorded, and that they were placed in a trunk together with other papers belonging to both of them, *held* not to show delivery of uncle's deed to nephew so as to constitute a conveyance of uncle's land to nephew.

19. Adverse possession ⇨80(1)

A deed is color of title only as to land actually described by it.

20. Adverse possession ⇨4

An heir cannot gain any title by adverse possession, whether in bad faith or in good faith, against the estate, and, in the absence of a conveyance investing him with actual title, it does not matter whether his possession is under some instrument relied on as giving color of title or not.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by James T. Johns against Lena A. Scobie, as administratrix of the estate of Isaac Johns, deceased, to obtain the reformation of a deed, wherein defendant filed a cross-complaint seeking to quiet title to the land claimed by plaintiff under the deed. From a judgment on the cross-complaint in favor of plaintiff, quieting plaintiff's title to the entire property without passing on question of reformation of the deed, defendant appeals.

Reversed.

Harvey, Johnston & Baker and T. H. Werdel, all of Bakersfield, for appellant.

Samuel Taylor, of Bakersfield, for respondent.

HAINES, Justice pro tem.

This action was commenced by respondent James T. Johns, as plaintiff, against appellant Lena A. Scobie, as administratrix of the estate of Isaac Johns, deceased, to obtain the reformation of a deed dated March 8, 1920, alleged to have been exe-

cuted and delivered by the decedent in his lifetime to respondent and to be defective in describing less land than that intended to be conveyed. Appellant filed an answer denying everything alleged in the complaint, which answer she subsequently amended by pleading additional defenses which need not for our present purposes be recited in detail. She also filed a cross-complaint seeking, in behalf of the decedent's estate, to quiet title, both to the property described in the complaint, as actually mentioned in the deed, and also to the additional property claimed by respondent as constituting the rest of that intended to be included in the conveyance. Respondent answered this cross-complaint claiming, as against the decedent's estate, and appellant as administratrix thereof, title by adverse possession to the whole of the property mentioned, asserting that such adverse possession had been maintained for more than five years before the commencement of the action, and that it was under a claim of title on respondent's part, exclusive of other right and hostile to any claim or title on the part of the decedent's estate, asserting that respondent had, during such five years paid all taxes levied and assessed on the land and further invoking the bar of sections 318, 319 and 322 of the Code of Civil Procedure. The trial court found in respondent's favor on the issues tendered by the cross-complaint and his answer thereto and on that basis rendered judgment quieting his title to the entire property without passing on any question of reformation of the deed. The present appeal is from this judgment.

The evidence disclosed that respondent was a nephew of the deceased and that both were bachelors; that for many years prior to the decedent's death the two lived together in a two-room adobe cabin on part of the land here in dispute, had their beds in the same room, and both kept their papers in the same trunk which was at some times locked and at other times unlocked. Uncle and nephew were jointly engaged in the cattle business on the property. The land embraced 157.55 acres, for which the uncle held a government patent, also kept in the trunk referred to. On March 8, 1920, the deceased caused to be prepared by one Allen, signed and acknowledged, a grant deed in respondent's favor for about 45 acres of land, the rest of the 157.55 acres having, according to respondent's claim, been omitted by reason of a mistake in the description. This deed, ac-

cording to respondent, was brought into the house by decedent, who said to respondent, "Here is the deed," whereupon respondent looked at it and put it in the trunk. Something like a year later respondent had Allen prepare another deed in decedent's favor, said to have described all of respondent's property so far as patented. This deed, respondent testified that he gave to decedent to read, after which decedent placed it also in the trunk "with the rest of the papers." According to respondent, however, it did not include the property embraced in the deed from his uncle to him but only affected property other and different from said 157.55 acres, which other property was owned by the respondent and over which he and his uncle were accustomed to run their stock.

Respondent testified that he did not intend to pass title by this last-mentioned deed to his uncle, the decedent, but as to its purpose that: "If anything happened to me so I would have it, if I happened to die or get killed I had no certainty of life. I was trying to protect him."

Thereupon the following colloquy ensued:

"Q. And the same thing applied with the deed made out by your uncle to you, made out to protect you in the event he died? A. That was the understanding, he was trying to protect me and the interest I had there.

"Q. If he died then you would have the deed? A. Yes.

"Q. If you died he was to have the other deed, that was it, wasn't it? A. I deeded mine to him in case anything happened to him before I passed away, I was protecting him as our partnership.

"Q. And if he passed away first he was to protect you? A. Certainly.

"Q. And in the event both lived both kept your own properties? A. Yes sir."

Isaac Johns, the uncle, died on December 26, 1924, whereupon respondent promptly recorded the deed from the decedent to himself and later burned the deed from himself to the decedent. Respondent has ever since occupied the whole 157.55 acres in controversy, all of which has been and is under fence, and has erected an 8-room dwelling upon it. No question about the ownership of the property appears to have been raised by anybody until 1936, in February of which year respondent says that he was told through an abstract company

that his title was defective, and on April 8 of which year appellant Lena A. Scobie secured letters of administration on the decedent's estate, whereupon the present litigation ensued.

[1,2] In our opinion it sufficiently appears from the record that Isaac Johns died intestate and that his heirs at law are five nephews and nieces, to wit, W. E. Johns, Elizabeth A. Wood, respondent James T. Johns, appellant Lena A. Scobie (administratrix), and Johnathan Jones. At the trial Mrs. Scobie was asked directly what heirs decedent left and answered giving this list. No objection was made to this testimony at the time it was given, though counsel for respondent now claims that it ought to be disregarded, both because the subject is not involved in the pleadings and for the further reason that the testimony is a conclusion of law since, although the evidence itself disclosed that the decedent died a bachelor, there is nothing in it specifically to negative the possibility of his having left parents, brothers or sisters surviving him. The inquiry as to who are the decedent's heirs is not an inquiry as to an ultimate fact in the present case, but only as to probative facts involved in the effort to determine whether respondent's possession of the land involved has been adverse to the estate as claimed. The circumstance that merely probative facts are not pleaded is no obstacle to proving them if relevant to the issues that are pleaded. Counsel for respondent had full opportunity to cross-examine Mrs. Scobie and inquire whether or not decedent left any nearer relatives than the nieces and nephews named and omitted either to do so or to move to strike out as a conclusion her statement that they were decedent's heirs. Neither did he introduce any evidence to the contrary or make any statement at the trial of any claim to the contrary. In these circumstances we think Mrs. Scobie's undisputed statement on the subject must be taken to be true.

[3-8] Apart from such effect as the deed from the deceased to the respondent may have on the situation, we think it clear that there is nothing in the circumstances, as we have recited them, to give any color to the respondent's claim to title by adverse possession as against either his coheirs or the estate. At the moment of the decedent's death in December, 1924, there being an intestacy, the title to all of his estate vested in his heirs at law, whether known

or unknown, Probate Code, § 300; former section 1384, Civ.Code; *Smith v. Olmstead*, 88 Cal. 582, 586, 26 P. 521, 522, 12 L.R.A. 46, 22 Am.St.Rep. 336; *Phelan v. Smith*, 100 Cal. 158, 164, 34 P. 667, 669; *Bates v. Howard*, 105 Cal. 173, 183, 38 P. 715, 718; *Murphy v. Clayton*, 114 Cal. 526, 528, 43 P. 613, 46 P. 460, 461; *Estate of Packer*, 125 Cal. 396, 399, 58 P. 59, 60, 61, 73 Am.St. Rep. 58; *State v. Miller*, 149 Cal. 208, 210, 85 P. 609, 610. Since there were five nephews and nieces all standing in the same degree of relationship to the decedent, they became, upon the decedent's death, tenants in common with each other. As was said in *Wood v. Henley*, 88 Cal.App. 441, 452, 263 P. 870, 876: "The dominant attribute of a tenancy in common is that the cotenants hold the common land by unity of possession, for which reason there can be no specific or determinate portion of the common land which any one of such tenants can claim as his in severalty. See Civ.Code, §§ 685 and 686. * * * It follows, therefore, that a tenant in common of an undivided interest in the common property is entitled to the possession of the whole thereof as against all persons except his cotenants. Each of such tenants has the right to enter upon and occupy the whole and every part of the common lands. This being so, such a tenant has no right to exclude his cotenant from any portion of the common lands. The logical consequence of the foregoing propositions is that the possession of one cotenant is possession for all. * * * And each has a right to assume that the possession of his cotenant is his own possession, until informed to the contrary, either by actual notice or by acts and declarations which may be equivalent to notice."

[9-11] Until a tenant has notice, either actual or constructive in some form that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, whatever may have been the actual intent of the cotenant in physical possession. *Lick v. Diaz*, 30 Cal. 65; *Miller v. Myers*, 46 Cal. 535; *McCauley v. Harvey*, 49 Cal. 497; *Packard v. Johnson*, 51 Cal. 545; *Packard v. Johnson*, 57 Cal. 180; *Aguirre v. Alexander*, 58 Cal. 21, 28; *Winterburn v. Chambers*, 91 Cal. 170, 180, 27 P. 658, 660; *Gage v. Downey*, 94 Cal. 241, 29 P. 635; *Faubel v. McFarland*, 144 Cal. 717, 78 P. 261. In the instant case, although it does appear that respondent has erected an 8-room house on the prem-

ises which might possibly, in view of such authorities as *Smith v. Barrick*, 41 Cal. App. 28, 182 P. 56, constitute notice to his nieces and nephews that he had begun to hold adversely to them, it does not appear whether or not such house was erected more than five years prior to the commencement of this action, and we find nothing in the other circumstances disclosed by the evidence that can measure up to the requirement of notice to cotenants of an intention to oust them. But even if there be an actual adverse holding by one heir of a decedent against other heirs who are his cotenants, accompanied by such notice as, in due time, to invest him as against them with a title by adverse possession, the acquisition of such title is no ouster of the estate nor does it free the heir who has gained it from holding in subordination to the estate. It is true, that just as an heir can convey his interest by a deed, so he can, by possibility, lose it by the adverse possession of a coheir "but the person who takes it by such adverse possession under the statute takes it subject to administration in the same manner that a grantee would." *Smith v. Barrick*, supra, page 32, 182 P. page 58.

[12,13] As was said in *Blair v. Hazzard*, 158 Cal. 721, 725, 112 P. 298, 300: "From the very nature of the case, title by adverse possession cannot be acquired against the administrator or executor. Such a title would be as foreign to our law as would be the claim of a tenant that he had acquired title by adverse possession against his landlord while holding under strict tenancy. The entry of a devisee or heir under such circumstances and his holding after, as matter of law, cannot be in hostility to the estate's rights. By the very language of the law it is in subordination to those rights. The administrator's or executor's possession never has been and never will be construed as possession in hostility to the heir or devisee, per contra, the possession of the heir or devisee, while the estate is in course of administration, can never be construed to be in hostility to the rights over that property with which the law clothes the estate." See, also, on the subject *Phelps v. Grady*, 168 Cal. 73, 76, 141 P. 926, 927.

[14,15] There is nothing in the claim that an heir or devisee can any more gain title by adverse possession against an estate upon which administration has not been instituted, or in respect of which the

starting of administration proceedings has been delayed until after the lapse of the five years during which the adverse possession is claimed to have gone on, that he can, by such adverse possession, gain title against an estate in which administration is all the time in progress. For that proposition *Blair v. Hazzard*, supra, is itself authority for there, though administration had once started, the executor had died and the administration been suspended for many years before a successor was appointed, and as will appear from the transcript in that case, it was during that very time that the purported adverse possession relied on was claimed to have occurred. Delay in instituting probate proceedings or their suspension after being instituted cannot conceivably place an heir in the position of a stranger to the decedent's title, nor have the authorities cited by respondent as bearing on the subject any application to any such facts.

[16-19] It being thus apparent that, apart from the consideration of the effect of his uncle's deed to him of March 8, 1920, the evidence fails to show that respondent had in fact acquired, by adverse possession, any exclusive title to all or any of the 157.55 acres in controversy as against the other heirs of the decedent, however much it might have been a legal possibility for him to have so gained one as against them; and it being altogether a legal impossibility, apart from a consideration of the effect of that deed, or some conveyance otherwise than through and under the estate, for him—being an heir—ever to gain any title by any length of adverse possession as against the decedent's estate, we come to consider what effect this deed really has upon the situation. Appellant claims in limine that it has no effect for want of delivery. The trial court did not undertake to find in terms whether it had been delivered or not. Since, however, there can be no delivery without an intention to deliver in the sense of parting with control, and respondent in his testimony, already quoted, has admitted that the intention of himself and his uncle was that, if both lived, each was to keep his own property, if we were to attribute to the trial court, as implicit in the decree made by it, any finding that the deed was delivered we would have to assume in so doing that the trial court had so found in the teeth of this admission. That would be altogether too violent an assumption to be en-

tertained. On the other hand, if the deed was not delivered there can be no case for its reformation. For the purpose of the present decision then; that is, as bearing on the inquiry whether the judgment under attack can be sustained in whole or in part, the case must be considered upon the theory that no such delivery has been proved. The only question that remains, then, is what color, if any, respondent's action in taking from the trunk and recording this deed, assuming it to have been in fact undelivered, lends to his claim to have established a title by adverse possession to the property involved. It is clear that to sustain his present judgment on that ground he must first show that such adverse possession has extinguished the interests of his coheirs for, patently, if they retained any undivided interests, these will remain subject to administration and he cannot be entitled to the judgment as rendered. But even if his use of this deed can be treated as having given notice to his coheirs of his having assumed a possession hostile to them this cannot be true as to the whole 157.55 acres, but only as to the 45 acres or thereabouts described in the deed since, as held in *Re Wasson*, 54 Cal.App. 269, 272, 273, 201 P. 793, 794, "a deed is color of title only as to land actually described by it" (citing 2 C.J. 177, par. 339); also in *Johnson v. Buck*, 7 Cal.App.2d 197, 202, 46 P.2d 771, 773, 774.

[20] Let us suppose, however, that his use of an undelivered deed did so characterize his acts as to amount to constructive notice to his coheirs that his presence was hostile and that the lapse of the statutory five years has invested him with their former rights, still, so far as this action is concerned, he has gotten no farther. He is not here litigating with his coheirs but with the administratrix of his uncle's estate, in her capacity as such. As against her it is not enough to show that his possession is under color of title. He again squarely encounters the principles of law announced in such cases as *Blair v. Hazard*, supra, and *Smith v. Barrick*, supra, which forbid him, being an heir, to institute any adverse possession against the estate as such. See, also *In re Estate of Sweitzer*, 215 Cal. 489, 11 P.2d 633. In that connection, we cannot see that it makes an iota of difference whether such attempted adverse possession is brazenly tortious or founded on a writing purport-

ing to give color of title. An heir cannot gain any title by adverse possession whether in bad faith or in good faith against the estate, and in the absence of a conveyance investing him with actual title it does not matter whether his possession in under some instrument relied on as giving color of title or not. By virtue of the fact that respondent is an heir of his uncle, he is confined to one or the other of only two possible means of establishing a title adverse to his uncle's estate. He must either show that he claims under a valid conveyance actually delivered by his uncle in his lifetime, which we cannot hold that the evidence could have warranted the trial court in here finding him to have; or else he must prove that he claims under a conveyance from some independent source vesting him with title superior to that of the estate, which is not here claimed at all.

Judgment reversed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 303

WILEY v. WRIGHT et al.

Civ. 1883.

District Court of Appeal, Fourth District,
California.

May 10, 1938.

Hearing Denied by Supreme Court
July 8, 1938.

1. Trial $\Rightarrow$ 397(1)

Where plaintiff sought to recover for damage to buildings, household goods, enjoyment of his dwelling by reason of soot, to his truck gardens, and enjoyment of his home by reason of loud noises of defendant's engine, and judgment awarded damages for deprivation of enjoyment of property, court's finding, that, although property was damaged, amount thereof was indefinite so that plaintiff could not recover therefor, was not grounds for complaint that, since the resulting damages were not particularized as respected the amount awarded on account of each specific element thereof, there was a failure to find upon the material issues.

2. Trial Ⓒ396(1)

Where damages of an essentially severable character are specially pleaded, the findings of the court should follow the pleadings.

3. Judgment Ⓒ253(1)

In action to recover damages for deprivation of enjoyment of plaintiff's dwelling by reason of soot and grease deposited therein by operation of defendant's engine, and for deprivation of enjoyment of property by reason of obnoxious noises created by engine, a judgment which combined the two elements of damages and made one award therefor was not error.

4. Trial Ⓒ398

Court's finding that plaintiff had sustained damage to buildings, gardens, etc., by reason of soot deposited thereon by operation of defendant's engine, but which awarded no damages therefor because of insufficiency of evidence to enable court to determine amount thereof, was not objectionable as being inconsistent or insufficient.

5. Appeal and error Ⓒ544(1)

Where appeal is upon the judgment roll alone, no question of sufficiency of evidence to justify the decision arises.

6. Nuisance Ⓒ19

Plaintiff was entitled to injunctive relief against defendant's operation of an engine which used heavy fuel oils and which caused soot and grease to deposit on plaintiff's buildings, gardens, household goods, etc.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Suit by M. A. Wiley against O. K. Wright and others to enjoin defendants from operating an internal combustion engine in which was used heavy fuel oils which caused grease and soot to settle over plaintiff's adjacent premises, and to recover damages suffered because of the operation of the engine. From a judgment granting the injunction and awarding plaintiff \$500 general damages, the named defendant appeals.

Affirmed.

E. I. Feemster, of Visalia, for appellant.

Waldo E. Burford, of Porterville, for respondent.

HAINES, Justice pro tem.

The plaintiff and respondent in this action, M. A. Wiley, is the owner of a farm

on which are located vineyards and truck gardens as well as barns, outhouses, and a dwelling house in which he and his family reside. Defendant and appellant, O. K. Wright, owns an adjacent farm on which he has installed, and for some time operated within a short distance of the respondent's dwelling, an internal combustion engine in connection with which he makes use of heavy fuel oils. The present action was begun to recover damages claimed to have been suffered by respondent personally and in his property through the operation of the engine and to obtain an injunction against its continued operation in the future. Respondent undertook to specify in his complaint the items of damage which he claimed to have suffered as follows: (a) For damage to his buildings due to the settling thereon of greasy dirt, soot, smoke, and odorous gases, \$250; (b) for damage to his furnishings, hangings, drapes, household goods and effects from the settling thereon of such greasy dirt, etc., \$250; (c) for damage to his comfortable enjoyment of his dwelling and home by reason of the settling on his furniture, hangings, etc., of such greasy dirt, etc., \$500; (d) for damage to his vines, truck gardens, and farm products by reason of the settling thereon of such greasy dirt, etc., \$500; (e) for damage to his comfortable enjoyment of his home and property by reason of loud, disturbing irritating noises emitted from such engine, \$500.

By a supplemental complaint he claimed additional damages of each of the classes mentioned, accruing subsequent to the time his original complaint was filed, which would, with the damages originally claimed, make the aggregate of each of the five several types of damage that he claims to have suffered \$750, \$750, \$1,500, \$1,250, and \$1,500, respectively, or in all \$5750.

After appropriate pleadings on the part of appellant, Wright, admitting his maintenance of the engine, but denying the infliction thereby upon respondent of the injuries complained of, or of any resulting damage, the case was tried and the court filed its findings of fact and conclusions of law, awarding damages to respondent to the extent of \$500, together with an injunction against the continued operation of the engine in such manner as to interfere with respondent's quiet and peaceable enjoyment of his property. From this judgment the present appeal is taken on the judgment roll. Appellant's attack is directed at what

he claims is the failure to find on material issues and the insufficiency of the findings to support either the conclusions of law or the judgment. The findings complained of are numbered IV, V and VI, and are as follows:

"IV. That at all times referred to in the plaintiff's complaint and supplemental complaint, the defendant O. K. Wright operated and threatened to continue the operation of said internal combustion engine in such manner that large quantities of harmful and injurious soot, smoke, carbon and odorous gases were emitted from said internal combustion engine, and allowed and permitted by the defendant O. K. Wright to drift over and settle upon the plaintiff's dwelling house, barn, out houses, truck garden and vineyard, and enter into the dwelling house of the plaintiff, and settle upon, around and about the furniture, hangings, drapes and household goods and effects of the plaintiff located in his dwelling; and that said defendant O. K. Wright at all times herein referred to operated and threatens to continue the operation of said internal combustion engine in such manner that loud, disturbing, obnoxious, irritating, discomforting and annoying noises originate in, arise and issue from said internal combustion engine;

"That the operation of said internal combustion engine by the defendant O. K. Wright, as alleged in the plaintiff's complaint and supplemental complaint has been carried on in such manner by the defendant O. K. Wright, and the defendant O. K. Wright threatens to continue the operation of said internal combustion engine in such manner as to reasonably disturb the free enjoyment of the life and property of the plaintiff by reason of the emission from said internal combustion engine of smoke, soot and carbon, and by loud, disturbing and obnoxious noises, and the same has, and unless restrained by order of this court, will continue to deprive and interfere with the plaintiff in the reasonably comfortable enjoyment of his dwelling and property.

"V. That by reason of the aforesaid manner of operation of said internal combustion engine by the defendant O. K. Wright, the plaintiff has been damaged in the comfortable use and enjoyment of his dwelling and property in the sum of Five Hundred (\$500.00) Dollars.

"VI. That sufficient, material and competent evidence was not introduced by the

plaintiff to show the damages sustained by the plaintiff by reason of said smoke, soot and carbon settling over and upon his dwelling house, barn and out houses, or upon the furniture, hangings, drapes, household goods and effects of the plaintiff, or upon the vines and garden truck and farm products of the plaintiff, and that although the same caused damage to the plaintiff, the court is unable from the evidence to determine the exact amount of said special damage."

It is claimed that, inasmuch as the said finding IV covers all five of the elements of damage alleged, whereas the resulting damages are not in the further findings particularized as respects the amount awarded on account of each or any of the above-mentioned specific elements, there is a failure to find upon the material issues; also that the finding VI contradicts itself in that, although respondent is found to have sustained damage by reason of the settling of smoke, soot and carbon over his buildings, furniture and other effects and over his vines, garden truck and farm products, it appears from the last clause of the finding that the court is unable to fix upon any amount as being the damage so sustained. In this last connection the claim seems to be that respondent's failure to establish any particular amount of damage of the description referred to in finding VI was tantamount to a failure to show that there had been any damage of that sort at all and that appellant was, therefore, entitled to a finding that there had been no damage whatever of that description.

In support of the other positions taken, counsel for appellant rely on the cases of *Haight v. Tryon*, 112 Cal. 4, 6, 44 P. 318; *Kaiser v. Dalto*, 140 Cal. 167-169, 73 P. 828, 829; *California Mother Lode Mining Co. v. Page*, 165 Cal. 549, 133 P. 14; *Klein v. Milne*, 198 Cal. 71, 243 P. 420; *James v. Haley*, 212 Cal. 142-146, 297 P. 920, 921; *Miller & Lux, Inc. v. Tulare Lake, etc., Dist.*, 219 Cal. 41, 46, 25 P.2d 451, 453, and *Cargnani v. Cargnani*, 16 Cal.App. 96, 116 P. 306, as holding that full findings are required upon all material issues, that in their absence the decision is against law, and that, where special damages are pleaded with particularized items, it is error to make a general finding of damage in aggregate sum without pointing out how much of it is attributed to each particular item.

[1-6] Examining the record as a whole, we are unable to see that appellant has any substantial ground for complaint, or that there has been any violation of the rules announced in the cases cited. It is apparent from the findings quoted that the \$500 money judgment awarded respondent was intended to represent such damage as he sustained from disturbance to his personal comfort through the occurrences incident to the operation of the engine specified in the finding IV, as distinguished from any sort of damage to his property as such. While it is true that his complaint alleged this personal type of damage under two separate specifications which we have referred to above under the respective letters (c) and (e), yet there was no intrinsic reason for so separating them, nor were they essentially severable either in their origin or in their effect. While, therefore, we do not doubt the correctness of the principle invoked that where damages of an essentially severable character are specially pleaded the findings should follow the pleadings, it does not seem to us that the mere circumstance that in plaintiff's pleadings an effort was made to break up this essentially single type of damage into two elements required the court to follow that course. Neither can we follow appellant in his strictures on the finding VI nor agree either that it is insufficient or inconsistent with itself. Its actual effect is to find that respondent has sustained damage of each of the descriptions to which we have above referred under the letters (a), (b) and (d) but that such damage has thus far been nominal in amount—in other words, that respondent has not thus far sustained any substantial property damage. No monetary award is based on this finding. The circumstance that this \$500 awarded for infringement upon the respondent's comfortable use of his premises is referred to in the conclusions of law as "General Damage" is unimportant. The context clearly shows what was meant. Since the appeal is upon the judgment roll alone, no question of the sufficiency of the evidence to justify the decision arises, nor is there any ground for claiming that the findings made are insufficient to justify the injunctive relief awarded. *Sullivan v. Royer*, 72 Cal. 248, 250, 13 P. 655, 656, 657, 1 Am.St.Rep. 51; *McMenomy v. Baud*, 87 Cal. 134, 26 P. 795; *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247; *Hulbert v. California, etc., Cement Co.*, 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436; *Dauberman v. Grant*, 198 Cal. 586, 246 P. 319, 48 A.L.R. 1244; *Melvin v. E. B. & A. L. Stone Co.*, 7 Cal.App. 327, 94 P. 390.

Even if we were able to conclude, as in fact we are not, that the findings are in any respect defective, we cannot see that appellant can have been in any way prejudiced thereby.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

11 Cal.2d 283

**NATIONAL ICE & COLD STORAGE CO.
OF CALIFORNIA v. PACIFIC FRUIT
EXPRESS CO.**

S. F. 15881.

Supreme Court of California.

May 2, 1938.

1. Licenses ⇨32(2)

Evidence sustained trial court's finding that ice company's sales of ice to express company which used ice for purpose of refrigeration of railroad cars which purportedly were owned by the express company were "retail sales" within Retail Sales Tax Act. St.1933, p. 2600, § 2(c).

2. Appeal and error ⇨1010(1)

A supported finding of fact cannot be disturbed by an appellate tribunal.

3. Licenses ⇨28

The Retail Sales Tax Act imposes tax on the retailer and not on the consumer. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32.

4. Taxation ⇨573½

A tax constitutes a "debt" owed by the person upon whom such tax has been legally imposed.

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

5. Constitutional law ⇨287**Licenses** ⇨7(1)

The provision of Retail Sales Tax Act imposing tax on privilege of selling personality but authorizing retailer, in case of sale under contract made prior to effective date of act, to add tax to sale price and collect it from buyer was unconstitutional and invalid, since the compelling of one person to pay a debt owed by another involves denial of due process. St.1933, p. 2600, § 4; Const.Cal. art. 1, § 13; Const. U.S. Amend. 14.

6. Statutes ⇨64(1)

Where it clearly appears that rejected portion of statute is so connected and intermingled with remainder thereof that in substance when such objectionable part is excluded it will be impossible to give effect to the manifest scope of the statute, the entire act must fall.

7. Statutes ⇨64(8)

The invalidity of provisions of Retail Sales Tax Act authorizing retailer to col-

lect from or to charge to buyer of personality the tax imposed on retailer does not render remainder of act invalid, since the elimination of the invalid provision would not affect the scope and design of the statute. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32, 34.

8. Licenses ⇨7(2)

The Retail Sales Tax Act imposing tax for privilege of selling tangible personality was not invalid on ground of discrimination between retailer making sales under contract entered into prior to effective date of statute and other retailers. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32.

9. Constitutional law ⇨136**Licenses** ⇨7(1)

The Retail Sales Tax Act imposing tax for privilege of selling tangible personality was not invalid as impairing obligation of contract, notwithstanding the tax was collectible from retailer making sales under contract executed prior to effective date of statute. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32.

10. Constitutional law ⇨137

The existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of state to levy or to impose a tax which may adversely affect the financial interest of either or any of parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract.

11. Licenses ⇨28

A retailer of ice selling ice to express company under contract executed prior to effective date of Retail Sales Tax Act imposing tax for privilege of selling personality could not recover tax from express company which used ice for purpose of refrigeration of railroad cars purportedly owned by express company. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 2(c), 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32.

12. Action ⇨6

In action for declaratory relief as to whether retailer selling ice, under contract executed prior to effective date of Retail Sales Tax Act imposing tax on privilege of selling tangible personality, could recover tax from buyer, court would not consider

questions regarding validity or enforcement of act which were not strictly germane to determination of rights of parties, since decision might greatly affect interest of state and others not parties to the litigation. St.1933, pp. 2600, 2602-2607, 2609-2611, §§ 2(c), 3, 4, 8, 8½, 9, 12, 13, 17, 18, 20, 23, 24, 26, 27, 31, 32.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action for declaratory relief by the National Ice & Cold Storage Company of California against the Pacific Fruit Express Company and another. From an adverse judgment, the plaintiff appeals.

Affirmed.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, and Nat Schmulowitz, all of San Francisco, H. M. Hammack, of Riverside, and Schauer, Ryon & McMahon and Leo T. McMahon, all of Santa Barbara, for appellant.

Robert E. Paradise, Gibson, Dunn & Crutcher, H. F. Prince, Homer D. Crotty, and David P. Evans, all of Los Angeles, for substituted defendant, cross-complainant and appellant Richfield Oil Corporation.

H. C. Booth, H. H. McElroy, and Hengstler, Dorr & Stevenson, all of San Francisco (Guy V. Shoup, of San Francisco, of counsel), for respondent.

HOUSER, Justice.

On July 31, 1933, a statute known as the "Retail Sales Tax Act of 1933," St.1933, p. 2599, became effective. As far as here is important, the title of that statute is: "An act imposing a tax for the privilege of selling tangible personal property and for the privilege of furnishing, preparing or serving tangible personal property, providing for permits to retailers, [and] providing for the levying, assessing, collecting, paying and disposing of such tax." In part, section 3 of the statute, p. 2600, provides that: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers." Various other excerpts from the statute which contain implications of the fact that the tax was intended to be levied upon retailers, are as follows: By section 9, p. 2602, it is provided that: "The tax levied

hereunder shall be a direct obligation of the retailer. * * * The retailer shall * * * make out a return. * * * The retailer shall deliver the return together with a remittance of the amount of the tax due to the office of the board." By section 12, p. 2603, retailers are required to obtain permits to engage in the business of selling tangible personal property at retail. By section 13, p. 2604, a permit fee of \$1 for each place of business of the retailer is required. By section 17, p. 2604, the Board of Equalization is authorized to make additional assessments of tax against a retailer. Section 18, p. 2605, authorizes the Board of Equalization to make arbitrary assessments of tax against a retailer. By section 20, p. 2605, a retailer is authorized to obtain a hearing for reassessment of taxes assessed against him. By section 23, p. 2606, refunds to retailers are authorized. Section 24, p. 2606, has reference to fraud or evasion of the tax on the part of a retailer. Section 26, p. 2607, provides for the collection of the tax from retailers; and the tax is declared a lien against his property. Section 27, p. 2609, requires retailers to keep records. Section 31, p. 2610, allows a retailer who has paid a tax under protest to bring an action for the recovery of such tax; and by section 32, p. 2611, penalties are provided for against retailers who may violate an order of the Board of Equalization.

In opposition to that which may be termed the manifest intent of the foregoing provisions, the statute also contains certain other provisions, to wit: By section 4 thereof, p. 2600, it is provided that: "In any case where tangible personal property is sold at retail under a contract made prior to the effective date of this act, which specifies and fixes the sale price and such sale is taxable under this act, the seller may add the tax imposed by this act to the sale price and collect it from the buyer." Section 8½ of the statute, p. 2602, contains the declaration that: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done." By section 8 of the statute, p. 2602, a retailer is inhibited from advertising in any manner that the tax will be assumed or absorbed by him, "or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded."

At a date approximately seven years preceding that upon which said act became ef-

fective, a written contract was entered into between the plaintiff and the defendant, which related to the furnishing and the sale of ice by the plaintiff to the defendant for the purpose of the refrigeration of railroad cars which purportedly were owned by the defendant. Subsequently, that agreement was extended in its operative effect until April 30, 1938. At no time did the agreement contain any provision relative to the payment by either party of any sales tax such as was contemplated by the provisions of the "Retail Sales Tax Act of 1933," or otherwise. Between the dates of August 1, 1933, and June 30, 1935, the plaintiff sold to the defendant many thousand tons of ice, which ice was used by the defendant both in interstate and in intrastate business, and for which full payment was made in accordance with the price fixed therefor by the terms of the agreement between the parties thereto. Based upon language that is contained within section 4 of the said act, p. 2600, to the effect that in circumstances such as hereinbefore have been outlined, the "seller" was authorized to "add the tax imposed by this act to the sale price and collect it from the buyer," the plaintiff claimed that the defendant was liable for the payment of an additional sum of money, equal to the amount of the tax which had accrued on the gross amount of the purchase price of the said ice which theretofore had been delivered by the plaintiff to the defendant. In reliance upon other provisions of the act which hereinbefore have been set forth, the defendant refused to pay to the plaintiff the amount of its said demand with reference to said tax, or any part thereof. Acting within its assumed authority in the matter, the State Board of Equalization, having made its demand on the plaintiff that it pay to the said board the amount of the tax that thus had become due, the plaintiff filed an action for declaratory relief against the defendant and the said board, to the end that the rights and the duties of the respective parties in the premises might be judicially determined. A general demurrer that was filed by said board to the complaint in said proceeding was sustained "without leave to amend" said complaint. From a judgment that subsequently was rendered in favor of the defendant Pacific Fruit Express Company, the plaintiff has appealed to this court.

Appellant urges the point that the defendant was a wholesaler of the ice that the plaintiff had delivered to it; conse-

quently, that the statute, having no reference to merchants of that description, had no application to the situation here presented.

Although in the course of the execution of the contract that existed between the parties thereto, the gross tonnage of ice that was thus sold and delivered might seem to indicate the conclusion that in effect a wholesale, rather than a retail, business was transacted, nevertheless, in view of the language that is contained in subdivision (c) of section 2 of the statute, p. 2600, wherein a "retail sale" or "sale at retail" is expressly declared to mean "a sale to a consumer or to any person for any purpose other than for resale," it becomes apparent that the question of the character of the business that was conducted by the ice company became one of fact. The finding that was made by the trial court on that issue was as follows: "The relationship between the plaintiff ice company and the defendant express company in the sales and furnishings of ice by the former to the latter out of which this controversy arose was that said ice company was the retailer of said ice within the meaning of the act referred to in Paragraph V of the complaint, and not a wholesaler of said ice; and said express company was, within the meaning of said act, the consumer of said ice, and not a retailer or wholesaler thereof."

[1, 2] The evidence with respect to that finding of fact is voluminous. However, including other evidence in support of the conclusion that was reached by the trial court in that connection, it may be noted that as a foundational fact, the express company was owned by the railroad companies to which ice was furnished; consequently, that in the various transactions that occurred between either of the railroad companies and the express company, the latter was acting only as an agent for the former; also, that in legal contemplation, as declared by numerous authorities, the ice was not purchased for the purpose of "resale," but, to the contrary, was "consumed" by the railroad company in performing its service to shippers in furnishing and refrigerating cars. No useful purpose would be served by presenting herein even a summary of the pertinent evidence in that regard. Suffice it to say that it is amply sufficient to sustain the conclusion that was reached by the trial court with reference thereto. In such circumstances, the rule is well estab-

lished that a supported finding of fact cannot be disturbed by an appellate tribunal.

It next is contended by the appellant that although by the terms of the statute the tax originally and primarily is imposed upon the retailer, the intention of the Legislature in enacting the statute, as is manifested by its entire language, was and is that in reality the consumer should pay the tax. In support of such contention the appellant not only cites numerous authorities from each of several jurisdictions throughout the United States, wherein statutes of similar character have been in question, but also considers and to some extent distinguishes the several precedents established by each of several of the appellate courts of this state which are at variance with its view of the issue thus presented. But however forceful may be the argument of counsel who represent the appellant, or however persuasive may be the several conclusions that heretofore have been reached by courts of other jurisdictions, the fact remains that in each of the criticized adjudications that have been made by the courts of this state with reference to the issue—apparently following a full and fair presentation to such courts of the identical point here in question, in each instance it has been ruled contrarily to the conclusion to which counsel now would have this court arrive. Nor, aside from the impelling effect of such authorities of our own state, in substance, that the tax was intended to be imposed upon the retailer, is this court convinced that the fiction of "legislative intent" was that the consumer or purchaser of personal property, sold at retail, should directly pay a tax that, according to the title of the act, was imposed "for the privilege of selling tangible personal property," and which act, by its express language, provides that: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers."

[3] The several precedents that have been established by the courts of this state for the rule that the tax is imposed upon the retailer, and not upon the consumer, are as follows: *People v. Herbert's of Los Angeles, Inc.*, 3 Cal.App.2d 482, 39 P.2d 829; *Rio Grande Oil Co. v. Los Angeles*, 6 Cal.App.2d 200, 44 P.2d 451; *Graham Bros., Inc., v. Los Angeles*, 6 Cal.App.2d 203, 44 P.2d 452; *Roth Drug, Inc., v. Johnson*, 13 Cal.App.2d 720, 57 P.2d 1022. And to that number should be added that of *Meyer Construction Co. v. Corbett*, 7 F.

Supp. 616, which was decided by the United States District Court. But even those cases do not constitute a complete list of the authorities in this state which deal directly and conclusively with the point at issue. The case of *Western Lithograph Co. v. State Board of Equalization*, Cal. Sup., 78 P.2d 731, reinforced by each of the companion cases of identical title, numbered respectively, S. F. 15915, 78 P.2d 738, and S. F. 15916, 78 P.2d 738, very recently decided by this court, is likewise clearly to the effect that the tax is a direct obligation upon the retailer for his privilege to conduct a retail business. The point here at issue is so thoroughly considered in the first of those cases that it becomes unnecessary to now devote further attention to that question.

However, the question of the legal right of the retailer to "pass on" to the consumer a tax which by the terms of the statute has been imposed directly on the retailer remains for consideration. As hereinbefore has been set forth, section 4 of the statute, p. 2600, contains the provision that: "In any case where tangible personal property is sold at retail under a contract made prior to the effective date of this act, which specifies and fixes the sale price and such sale is taxable under this act, the seller may add the tax imposed by this act to the sale price and collect it from the buyer." Other language employed in the statute, although not containing direct authorization of the retailer to collect the tax from the purchaser, also impliedly give him that right.

It is undisputed that each of the several sales of the commodity, which is the subject matter of the instant inquiry, was made pursuant to and "under a contract made prior to the effective date of this act" and that the "sale price" of such commodity was specified and fixed by the provisions thereof. It therefore is clear that as far as legislative enactment is concerned, the ice company was fully authorized to add to the sale price of the ice which it sold to the express company the tax which, by the terms of the same statute had been directly imposed on the ice company as the seller and retailer of such ice. But in that connection, although no "actual controversy" exists between the respective parties as to the existence of such statutory authorization of the ice company to "pass on" the tax to the express company or to collect it

("as far as the same can be done"), it is urged that such direction or mandate is violative of the "due process" clause of both the State and the Federal Constitutions, Const. Cal. art. 1, § 13; Const. U.S. amend. 14, with reference to the fundamental right of ownership of property. At the outset, it is commonly conceded by the appellant and the respondent that, as affecting a transaction of the character of a sale of "tangible personal property" it would have been within the power of the Legislature to have imposed a tax upon either the retailer or the purchaser of such property; but in that connection, even if any controversy may be said to exist as between the parties hereto, the only possible difference of opinion between them relates to the constitutionality of the provisions of section 4 of the act, p. 2600, which, in effect, is that with reference to a contract "made prior to the effective date of this act" the purchaser of tangible personal property may be compelled to reimburse the retailer thereof for money paid or to be paid by him as a tax "for the privilege of selling" such property. No authorities are cited by either of the parties to this appeal pertinent to the point thus tentatively suggested for consideration by this court. In effect, respondent confidently has asserted that as applying to such a situation no authority is required; and in the same connection, the appellant makes the statement that: "We take it that there is a clear violation of due process to provide by statute that a tax originally and ultimately imposed on and payable by one person shall be paid by another. On the other hand, unless there is a legal right in the seller to collect and an ultimate legal liability on the purchaser to pay the sales tax or the amount thereof, the state may not provide that the seller 'shall collect' the tax or the amount thereof from the purchaser and provide penalties for failure to secure such payment."

[4,5] As a legal deduction, it has been judicially declared that a tax constitutes a debt owed by the person upon whom such tax has been legally imposed; and aside from equitable considerations (which here are not involved), to baldly legislate that without, and in the absence of either due or any process of law, a legal debt that is owed by one person must be paid by another, is quite at variance

with ordinary notions of that which may be termed the administration of justice. It therefore may be deemed concluded, that as far as may concern the particular or any other provision of the statute to which attention hereinbefore has been directed, which purports either directly or indirectly to authorize the retailer of "tangible personal property" to collect from or to charge to the purchaser thereof the tax imposed upon its retailer "for the privilege of selling" such property, is unconstitutional and consequently invalid. But it should be noted that it is not because of any asserted or assumed lack of power in the state in the first instance to impose a tax on a purchaser of "tangible personal property" that the invalidity of the several provisions of the statute is adjudged, but rather for the reason that having first directed the imposition of a tax on the retailer of such property, by the terms of the statute he is authorized to compel the purchaser to assume the retailer's direct liability in that regard, that the unconstitutionality of the several provisions of the statute is made to appear. However, such declaration of the law is not intended to indicate the illegality of authority which may be lodged in a retailer to "pass on" the tax to a purchaser with the latter's consent thereto, either expressly or impliedly given. That sort of arrangement between interested parties in such a sale is not here involved.

It should be remembered that the record herein discloses the fact that although originally the state (acting through its Board of Equalization) was a party to the proceedings in the lower court, by reason of the additional fact that the state's demurrer to the complaint was sustained "without leave to amend," thereafter the state ceased to be a party to the proceeding. Nor is it represented in any way on the hearing of the instant appeal. For that reason, the propriety of the rendition of that which might be termed an "ex parte" decision by this court upon questions that are not properly before this court in this proceeding, and which may be of vital importance to the interest of the state in matters that may or do affect the collection of revenue for the benefit of the state, is more than doubtful. Strictly speaking, as between the parties to the contract, the only ultimate question properly at issue is.

whether the plaintiff has the legal right to collect from the defendant the tax that by the provisions of the statute is imposed on the plaintiff. However, since possibly, to a limited extent, some of the less difficult of those questions may appear to relate to the main issue that constitutes "an actual controversy," section 1060, Code Civ.Proc., between the respective parties thereto, and the probability that none of the several rulings which will be made thereon should adversely affect the interest of the state, they will be accorded consideration, to wit:

[6] In substance, it is contended by the appellant that should the decision by this court be to the effect that the retailer only is liable for the payment of the tax, and that in the absence of any agreement on the part of the consumer or purchaser that he will assume that burden, he is under no legal liability to do so—with the result, as hereinbefore has been indicated, that as far as the statute in question may purport to create in the retailer a legal right to reimburse himself from the "consumer" for the payment which the retailer has made of any tax, is unconstitutional—the consequence is that the entire act may be invalid. The reason that is assigned by the appellant for such suggestion is that that portion of the act which this court here decides is unconstitutional is "non-separable" from the remainder of the act. Respecting that subject, the rule is well established that where it clearly appears that the rejected portion of a statute is so connected and intermingled with the remainder thereof that, in substance, when such objectionable part is excluded, it will be impossible to give effect to the manifest scope of the statute, the entire act must fall. But in itself, section 34 of the statute, p. 2611, would seem a sufficient answer to appellant's contention, in that it provides that: "If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional."

79 P.2d—25

[7] Furthermore, a comparison of the objectionable portion of the instant statute both with the title and the body thereof, impels the conclusion that the scope and the design of the statute will remain unharmed and unaffected by reason of the elimination therefrom of the unconstitutional provision here under consideration. As indicated by its title, the general purpose of the act is to impose a tax "for the privilege of selling tangible personal property"; and by section 3 of the act, p. 2600, it is expressly provided that such tax "is hereby imposed upon retailers"; all of which, together with its various incidents, remains intact and unimpaired. It follows that appellant's contention in that regard cannot be sustained.

[8-10] Notwithstanding the several conclusions that the tax is a liability imposed on the retailer of "tangible personal property," which, without and in the absence of either the express or the implied consent of the purchaser, may not be "passed on" to the latter, the appellant urges the point that for the reason that the sale which was made by it to the respondent was pursuant to and in accordance with the terms of a contract which was entered into between the respective parties at a date which preceded that upon which the statute became operative—the effect of the statute, if the appellant be obliged to pay the tax, may be that it is discriminatory as to it, and that the statute may impair the obligation of the contract which was entered into by the appellant with the respondent in that it has the effect of decreasing the sale price of the ice which the appellant has contracted to deliver to the respondent at a specified and fixed compensation therefor. With reference to the asserted discrimination against the appellant, it is suggested that if under the general provisions of the act other retailers be permitted to "pass on" the tax to their respective purchasers, and the appellant be not so privileged, the former will be granted an advantage which is withheld from the appellant. But as far as may be ascertained, no such variance in treatment of different respective retailers will ensue. Had the provisions of section 4 of the act, p. 2600, been upheld as valid, it is not impossible that other retailers might feel themselves aggrieved by rea-

son of a preference which might be asserted by them to exist in favor of the appellant; but with the elimination from the statute of the provisions of section 4 thereof, the result is that the appellant is placed at least on an equality with all other retailers. Regarding the point that as to sales of ice made by the appellant "under a contract made prior to the effective date of this act," the imposition of a tax on the retailer will have the effect of lessening the sale price of such ice, and consequently will impair the obligation of such contract, it need only be said that the principle of law is well established that the existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract. An excerpt from one eminent authority will suffice to illustrate the rule. In the dissenting opinion in the case of *Coolidge v. Long*, 282 U.S. 582, at page 638, 51 S.Ct. 306, 75 L.Ed. 562, the following pertinent language occurs: "In short, it is evident from the authorities cited, and many more which might be quoted, that the power to tax property, or a right, or a status, or a privilege, acquired or enjoyed by virtue of a contract, is no wise hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act. No exercise of a governmental power, whether it be that of taxation, police, or eminent domain, though it make less valuable the fruits of a private contract, can be said to impair the obligation thereof."

[11,12] With reference particularly to its own situation as the imposition of the tax may affect it, the appellant presents several other objections to either the validity or the enforcement of the statute; none of which in any degree may be said to be strictly germane to a determination of the rights of either of the respective parties to this proceeding, with relation one to the other; and since a decision as to any or either of such objections might greatly affect not only the interest of the state, but as well that of many others who may occupy a position with reference to the imposition of the

tax similar to that either of the appellant or the respondent, none of whom is represented in this proceeding, it is deemed inadvisable that consideration be given by this court to any or either of such objections.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.



11 Cal.2d 296

PEOPLE v. McDUFFIE.

S.F.No.15804.

PEOPLE v. McDUFFIE et al.

S.F. 15982; 15804.

Supreme Court of California.

May 2, 1938.

Rehearing Denied May 31, 1938.

1. Licenses ⇐8(1), 28

Under statute imposing tax on privilege of selling tangible personalty, a retailer of tangible personalty making sales under contract executed prior to effective date of statute is directly and solely liable to the state for taxes imposed upon the retailer. St.1933, p. 2600, §§ 3, 4.

2. Licenses ⇐32(2)

A retailer making sales of tangible personalty under contract executed prior to effective date of statute imposing tax on privilege of selling tangible personalty could not add the tax to the sale price and collect it from the buyer, notwithstanding statute purported to give such right. St. 1933, p. 2600, §§ 3, 4.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the People of the State of California against William C. McDuffie, as receiver of the Richfield Oil Company of California, to recover taxes allegedly due state, wherein the defendant filed a

cross-complaint against the American-Hawaiian Steamship Company and others to recover over amount which the state sought to recover from the original defendants. From a judgment in favor of the cross-defendant and from a judgment for the state, William C. McDuffie, as receiver of the Richfield Oil Company of California, appeals.

Affirmed.

Robert E. Paradise, Gibson, Dunn & Crutcher, Henry F. Prince, Homer D. Crotty, David P. Evans, Miller, Chevalier, and Peeler & Wilson, all of Los Angeles, for appellant.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, and Nat Schmulowitz, all of San Francisco, H. M. Hammack, of Riverside, and Schauer, Ryon & McMahon and Leo T. McMahon, all of Santa Barbara, for National Ice & Cold Storage Co.

U. S. Webb, Atty. Gen., H. H. Linney and James J. Arditto, Deputy Attys. Gen., and Hengstler, Dorr & Stevenson, Henley C. Booth, and H. H. McElroy, all of San Francisco, for respondent.

HOUSER, Justice.

On July 31, 1933, an act known as the "Retail Sales Act of 1933," St.1933, p. 2599, became effective. Particularly by the provisions of section 3 thereof, p. 2600, a tax was imposed on retailers of "tangible personal property." In effect, section 4 of the act, p. 2600, provides that where a retail sale is made "under a contract made prior to the effective date of this act, * * * the seller may add the tax imposed by this act to the sale price and collect it from the buyer." Although the statute contains several other provisions which, considered either singly or as a whole, may be regarded as indicative of the intention of the Legislature in passing the act as to whether the tax should be borne directly by the retailer, or whether the retailer should be entitled to compel payment thereof by the purchaser—in the main, the provisions to which attention has been directed are controlling.

Richfield Oil Company is a producer of oil. Some time "prior to the effective date of this act," under the terms of a contract that had been entered into between Richfield Oil Company and each of several "consumers" of oil, the former agreed

to sell to each of such "consumers" large quantities of oil. Respectively, both before and after the statute took effect, in accordance with a provision of each of said contracts, Richfield Oil Company delivered to each of such "consumers" many thousand gallons of oil at the price fixed in each of said respective contracts. No tax was paid on account of either or of any of such sales, either by Richfield Oil Company to the state, or by either or any of such "consumers" to Richfield Oil Company. Thereafter, and in assumed due course, in the lower court an action was brought by the state against William C. McDuffie, as receiver, etc., of Richfield Oil Company, to recover the amount of tax that had become due to the state on account of such sales of oil. Thereupon, by leave of the court, the defendant in the action filed a cross-complaint against each of the said "consumers" for the purpose of recovering the amount of tax which it was alleged had become due to Richfield Oil Company on account of a sale or sales of oil made by it to such "consumer" and for which the state was endeavoring to collect from Richfield Oil Company. To that cross-complaint each of the cross-defendants filed a general demurrer, which was by the court sustained "without leave to amend." From the ensuing judgment in favor of such cross-defendants, Richfield Oil Company appealed to this court. Thereupon the original case went to trial, with the result that the state was awarded a judgment against Richfield Oil Company. From the judgment that was thus rendered, Richfield Oil Company has also appealed.

[1, 2] The principal and deciding issues in each of such appeals are whether, in circumstances such as hereinbefore have been indicated to exist, a retailer of "tangible personal property" is directly and solely liable to the state for the tax that is imposed upon him for "sales" that he may make; also, whether the retailer has a legal right to "add the tax * * * to the sale price and collect it from the buyer."

Each of such questions is decisively answered in the appeal in the case of National Ice & Cold Storage Company v. Pacific Fruit Express Company, 79 P.2d 380, this day decided by this court. No useful purpose would be served by a repetition here of the reasons there given for

the conclusions therein reached by this court.

The judgments are and each of them is affirmed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.



11 Cal.2d 301

BORENSTEIN v. BORENSTEIN.

L. A. 16497.

Supreme Court of California.

May 20, 1938.

1. Divorce ⇌ 182

After transcript and brief were filed in husband's appeal from order denying motion to vacate divorce decrees, trial court nevertheless had jurisdiction to order husband to pay money to wife for attorneys' fees and costs in defending the appeal.

2. Divorce ⇌ 262

Where husband failed to comply with order requiring him to pay attorneys' fees and costs for wife's defense of his appeal from order in divorce proceedings, motion to stay proceedings until husband should comply, and not motion to dismiss the appeal, was the proper remedy.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit for divorce by Jeanette Borenstein against David Borenstein. From an order denying defendant's motion to vacate, set aside, and annul an interlocutory and final decree of divorce, defendant appeals. On motion to dismiss the appeal.

Motion to dismiss the appeal denied.

Albert A. Albeck, of Los Angeles, for appellant.

Nat Recht, of Los Angeles, for respondent.

WASTE, Chief Justice.

Motion to dismiss an appeal from an order denying motion to vacate, set aside, and annul an interlocutory and final decree of divorce on the ground that the appellant did not obey a court order to pay counsel fees and costs to respondent.

The parties have been divorced. Defendant moved the trial court to vacate and set aside the interlocutory and final judgments herein on the grounds that plaintiff wife had not been residing in this state for one year prior to the filing of her action, and that the parties had already been divorced by decree of a Mexican court. The motion to vacate was denied. Defendant appealed from the order by notice filed August 14, 1937.

The printed transcript was filed herein on September 18, 1937. The opening brief was filed October 11, 1937. One stipulation shows that respondent was granted until December 10, 1937, to file her brief. No further extensions appear. The brief of respondent has not been filed.

[1] From the moving papers it appears that on October 21, 1937, an order was made by the trial court requiring appellant to pay to respondent the sum of \$300 as and for attorneys' fees in defense of the appeal, and the further sum of \$50 for costs. Payment was to be made forthwith. This order was entered after the filing of the transcript and brief herein, but was one which the trial court had jurisdiction to make. *Bruce v. Bruce*, 160 Cal. 28, 116 P. 66; *Dunphy v. Dunphy*, 161 Cal. 87, 92, 118 P. 445.

[2] Upon the sole ground that the order allowing attorneys' fees and costs has not been complied with, respondent now moves to dismiss the appeal. We are cited to no authority or statements of fact which would justify a dismissal on such grounds. There does not appear to be any merit in the present motion. A motion to secure a stay of proceedings until appellant shall comply with the order requiring the payment of attorneys' fees and costs, if made, would afford a proper remedy. *Allen v. Superior Court*, 133 Cal. 504, 65 P. 977.

The motion to dismiss the appeal is denied.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; HOUSER, J.

PEOPLE v. SUMMAR.

Cr. 362.

District Court of Appeal, Fourth District,
California.

May 19, 1938.

Hearing Denied by Supreme Court
June 17, 1938.

1. Criminal law ☞1023(10, 13)

Neither a verdict nor an order denying a motion in arrest of judgment are appealable. Pen.Code, § 1237.

2. Criminal law ☞1159(4)

A conviction would not be reversed for alleged discrepancies in the testimony of some of the witnesses, where the discrepancies related to minor facts and went only to the weight of the evidence and the credibility of the witnesses.

3. Criminal law ☞1159(2, 4)

The weight of the evidence and the credibility of the witnesses are questions addressed in the first instance to the jury and in the second instance, on motion for new trial, to the trial judge.

4. Criminal law ☞1160

The acceptance by the jury and trial judge of the testimony of certain witnesses as true in spite of alleged discrepancies was final and conclusive on appeal, particularly where record warranted conviction.

5. Criminal law ☞1043(2)

A defendant who objected to argument in which the deputy district attorney referred to defendant as a professional crook and referred to defendant's relationship to the sister of prosecuting witness, but failed to object further when court instructed jury to disregard only that portion of the argument in which reference was made to the relationship, could not complain on appeal that jury were not instructed to disregard reference to defendant as a professional crook, since defendant was required to call specific attention to the portions of the argument to which he objected.

6. Criminal law ☞1186(4)

Where evidence warranted conviction, allegedly improper argument of deputy district attorney did not authorize reversal. Const. art. 6, § 4½.

7. Criminal law ☞1119(4)

Alleged misconduct of prosecuting officer in final argument, in answer to argument of defense counsel which was not in

the record, presented no ground for reversal, since reviewing court could not determine its prejudicial effect.

8. Criminal law ☞1037(2), 1129(1)

Alleged misconduct of prosecuting attorney in final argument, to which no objection was made or request tendered that jury be instructed to disregard it, or assignment made thereof as error, could not be urged as error on appeal, where remark was not of such character that prejudice from it could be presumed.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Charles S. Summar was convicted of signing, uttering, and delivering two no-fund checks, and he appeals.

Affirmed.

J. Leman Houseworth, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

MARKS, Justice.

[1] Defendant was convicted of violating the provisions of section 476a of the Penal Code by signing, uttering and delivering two no fund checks, one for \$200 and the other for \$75. He has appealed from the judgment and from the order denying his motion for new trial. He has attempted to appeal from the verdicts and from an order denying his motion for arrest of judgment, neither of which are appealable. Section 1237, Pen. Code; People v. Jackson, Cal.App., 74 P.2d 1085.

Defendant's specifications of error may be considered under two heads: First, that the evidence is insufficient to support the verdict and judgment, and, second, misconduct on the part of the prosecuting officers.

[2-4] Defendant urges that because there are "discrepancies" in the testimony of some of the witnesses and between that of certain witnesses for the People, we should reject the evidence of all of those witnesses and order a new trial. We have read the entire record and these "discrepancies" concern minor facts. Such discrepancies are more common than uncommon in the evidence of witnesses who are attempting to tell the truth about events which happened several months prior to the time when they testified. At best these discrepancies only go to the weight of the evidence and

the credibility of the witnesses. Such questions, in the first instance, are addressed to the jury, and in the second instance, on motion for new trial they are addressed to the trial judge. These triers of fact accepted the testimony of these witnesses as true, which is final and conclusive on appeal. Further, a study of the record leaves the conviction that defendant was guilty of both of the crimes of which he was convicted and that the jury would have been remiss in its duty had it brought in a verdict in his favor on either of them.

[5, 6] During the opening argument of the deputy district attorney the following occurred:

"Mr. Thompson: Now ladies and gentlemen you are not dealing with an ordinary crook in this case. He is no amateur. He is a professional. He has deceived his own people that thought he was legitimately married to their sister, and they were trying to help him at a time before they knew who he was, what he was, or how he would deal with them.

"Mr. King: If the court please, I ask counsel's pardon for the interruption, but I feel it is my duty to object to that line of evidence, because there is no evidence on which that inference might be drawn.

"The Court: Keep within the record, counsel.

"Mr. King: Might I ask that the jury be instructed to disregard it?

"The Court: Yes, I think the jury should be instructed to disregard the comments as to the relationship of the defendant and the sister of the complaining witness."

Defendant now complains because the trial judge failed to instruct the jury to disregard the statements that he was no ordinary crook, no amateur, a professional.

The objection of counsel for defendant was indefinite. When the trial judge instructed the jury to disregard the latter part of the quoted statement he evidently believed that he was conforming to the request of counsel. If defendant desired to have the jury instructed to disregard the earlier part of the statement, and if he was dissatisfied with the instruction given, he should have called specific attention to those portions of the argument to which he objected. Further, if we assume error on the part of the deputy district attorney we cannot reverse the judgment because of the provision of section 4½ of article 6 of the Constitution.

[7, 8] The second occasion of purported misconduct of the prosecuting officer occurred during the final argument to the jury. The remark here assigned as error was evidently made in reply to an argument of defense counsel which is not in the record. In the absence of the argument of defense counsel "a reviewing court is unable intelligently to appraise the effect of the criticized remarks and to declare that the language amounts to such prejudicial misconduct as to demand reversal of the judgment." *People v. Chilcott*, 18 Cal.App.2d 583, 64 P.2d 450, 452. Further, no objection was made to this remark, the trial judge was not requested to instruct the jury to disregard it and it was not assigned as error. The remark was not of such character that prejudice from it must be presumed. Under such circumstances the error, if any, cannot be urged here for the first time. *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467.

The attempted appeal from the verdicts and from the order denying the motion for arrest of judgment is dismissed.

The judgment and the order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



26 Cal.App.2d 334
PEOPLE v. MORENO.

Cr. 3097.

District Court of Appeal, Second District,
Division 2, California.

May 13, 1938.

1. Criminal law ☞1023(10)

An appeal from a verdict of guilty of violating the State Narcotic Act is unauthorized. *St.*1929, p. 380.

2. Criminal law ☞1159(4)

A reviewing court should not interfere with a verdict and judgment on ground that the evidence of the prosecution was so inherently improbable that it was of little, if any, value, unless that court can say that the testimony was so obviously and inher-

ently improbable that the only recourse is to reverse the judgment.

3. Criminal law ⇨1159(4)

Contradictions and inconsistencies in testimony alone do not constitute "inherent improbability" justifying a reviewing court in reversing a judgment, and it is not sufficient that testimony may disclose unusual circumstances.

4. Criminal law ⇨1159(2, 4)

In prosecution for violating the State Narcotic Act, evidence that 25-cent piece which officers had given to an "operator" just before purchase of a marihuana cigarette from defendant was not found on defendant and that officers did not find any cigarettes on him, in his automobile, or at his residence, bore on weight and credibility of testimony and was for jury and not for reviewing court. St.1929, p. 380.

5. Poisons ⇨9

Evidence that an "operator" bought a marihuana cigarette from defendant for 25 cents and that officers found marihuana seeds in defendant's automobile was sufficient to sustain conviction for selling, furnishing, and giving away flowering tops and leaves of Indian hemp in violation of the State Narcotic Act. St.1929, p. 380.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Lamberto Moreno was convicted of selling, furnishing, and giving away flowering tops and leaves of Indian hemp in violation of the State Narcotic Act, St.1929, p. 380, and he appeals from the judgment, from the verdict, and from an order denying his motion for a new trial.

Appeal from verdict dismissed, and judgment and order affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of selling, furnishing, and giving away flowering tops and leaves of Indian hemp in violation of the State Narcotic Act, St.1929, p. 380. The defendant also appeals from the verdict and from the order denying his motion for a new trial.

[1] The appeal from the verdict must be dismissed for the reason that it is unauthorized by law. *People v. Bratten*, 137 Cal.App. 658, 31 P.2d 210; *People v. Wilson*, 7 Cal.App.2d 543, 46 P.2d 229.

[2-5] At about 10:30 p. m. an employee of Fort McArthur, who was assigned by the commander of the fort to act as an "operator" for the police authorities by reason of the sale of marihuana to soldiers of the fort, approached defendant, who was standing next to a lamp standard on the corner of Fourth street and Harbor boulevard, San Pedro, and, after talking with appellant for a few minutes purchased a marihuana cigarette from him for the sum of 25 cents. The transaction was observed by Officer Reid of the Narcotic Detail and Inspector Harrigan of the State Narcotic Division, who were on the opposite corner approximately 15 or 20 feet away, and who testified. Officer Reid then walked west on Fourth street, at which time the "operator" handed to him the cigarette and walked away. The officer watched the defendant who entered a beer or pool hall where he remained about 2 minutes. Upon his reappearance the defendant entered a vacant lot and went behind a brick building, and when he returned to the sidewalk Officer Reid and Inspector Harrigan placed him under arrest. They then searched defendant, and, not finding any marihuana cigarettes on him, took him behind the brick building and asked him where his "plant" was. He denied having a plant and stated that he went there for a certain purpose, a call of nature, and said to the inspector, "Amigo, give me a break. I served two jolts in the big house and have served time in the city for marihuana."

Defendant was taken to his automobile, which was parked on Beacon street between Third and Fourth streets, and on searching it the officers found a lot of marihuana seeds in the trunk and under the front seat. While seated in the police car the defendant was asked how long he had been selling marihuana, and he stated that he had previously sold marihuana but the town was so "hot" he had quit. He was asked how much money the "operator" had given him for the cigarette, and he stated that he had received no money for it but had given the cigarette to the "operator" for nothing.

The only legal question raised by the defendant on behalf of his appeal is that the evidence of the prosecution is so inherently improbable in its essential features as to render all of such evidence of little if any

value, and therefore the verdict of the jury was due to passion and prejudice.

Unless the appellate court can say that the testimony is so obviously and inherently improbable as to leave the court no recourse without self-stultification, except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment of the trial court upon that ground. *People v. Antunez*, 28 Cal.App. 740, 153 P. 963; *People v. Becker*, 140 Cal.App. 162, 35 P.2d 196. Such improbability must "plainly appear before the reviewing court should assume the functions of the trial jury." *People v. Antunez*, supra (page 964). "Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability" (*People v. Amadio*, 25 Cal.App. 729, 145 P. 151, 152), and "it is not sufficient that the testimony may disclose circumstances which are unusual" (*People v. Collier*, 111 Cal.App. 215, 226, 295 P. 898, 902). The limitations placed upon the appellate court and the rules by which it must be governed are stated in *People v. Lewis*, 18 Cal.App. 359, 364, 123 P. 232, 234: "We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred—some are cited—where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury."

The defendant claims that the evidence of the prosecution is inherently improbable because the 25-cent piece which the officers had given to the so-called "operator" just previous to the purchase of the cigarette was not found on the defendant but only a nickel and a dime, and that the officers did not find any marihuana cigarettes on him or in his automobile or at his residence, which was later searched by them, nor be-

hind the brick building. Also that the testimony of the officers was inherently improbable to the effect that they found a lot of marihuana seeds in the defendant's automobile and failed to take any of the evidence. These are all circumstances in evidence bearing upon the weight and credibility thereof which should be argued to the jury and with which this court has nothing to do.

The record is one which does not present a question of inherent improbability, and the authorities cited by defendant, i. e., *People v. Benson*, 6 Cal. 221, 65 Am.Dec. 506, and *People v. Hamilton*, 46 Cal. 540, present factual matters entirely dissimilar to those found in the instant case.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, J.



22 Cal.App.2d 105

**PROVIDENT LAND CORPORATION v.
PROVIDENT IRR. DIST. et al.**
Civ. 5868.

District Court of Appeal, Third District,
California.

July 20, 1937.

Rehearing Granted Aug. 19, 1937.

1. Injunction ☞118(1)

A complaint asking injunctive relief should contain a statement of facts sufficient to warrant the issuance of the writ.

2. Injunction ☞118(1)

A complaint asking injunctive relief should state the specific facts on which relief is sought, omitting inferences, generalities, presumptions, and conclusions.

3. Injunction ☞118(1)

A complaint asking injunctive relief which depends on mere conclusions of law and does not state the facts on which the legal conclusions are based is insufficient on general demurrer, since such conclusions tender no issue and must be disregarded.

4. Injunction ☞118(3)

In action by holder of irrigation district bonds to enjoin district from selling or leas-

ing any land within district except on open and free selling and leasing thereof, a complaint which alleged that officers of district were about to transfer by lease for an inadequate consideration the best portions of lands owned by the district and that directors refused to permit open and free leasing and selling of district land at its fair market value, or to permit intending purchasers and lessees of such land to openly and freely bid for the lease or sale thereof, did not authorize relief, since such allegations were too general and constituted mere conclusions.

5. Injunction $\S$ 122

Injunctions may not be granted on affidavits, the contents of which are stated on information and belief.

6. Injunction $\S$ 118(1), 122

An injunction should not be issued on a complaint which contains nothing but general allegations, showing that the complaint is founded simply on information and belief, and contains no specific instances or facts supporting the conclusions of the pleader.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Injunction proceeding by the Provident Land Corporation against the Provident Irrigation District and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellant.

George R. Freeman, of Willows, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff for the purpose of enjoining the district-defendant from entering into a proposed lease with one A. E. Moutrey, pursuant to a resolution passed by the board of directors of said district, on or about the 5th day of August, 1936. A temporary restraining order was issued, and upon the hearing of cause, the court dissolved the temporary restraining order and sustained the defendants' demurrer to the amended and supplemental complaints filed by the plaintiff.

The plaintiff sought to enjoin the district and its officers from selling or leasing any land within the district except upon open and free selling and leasing of the same.

The respondents' general and special demurrers were sustained without leave to amend. From the judgment of dismissal, after sustaining the general and special demurrers aforesaid, the plaintiff appeals.

Section 29 of the California Irrigation District Laws (St.1897, p. 263) was amended in 1935 (St.1935, p. 463, General Laws 1935, page 1163), by adding thereto the following words: "The board of directors of said district is hereby authorized and empowered on behalf of the district to hold, use, acquire, manage, occupy, possess, sell or lease said property, as herein provided." The section was further amended, but what we have quoted is all that is pertinent to this case.

It appears from the complaint that several thousand acres of land belonging to the district are leased by the board of directors for the purposes of rice culture. The complaint sets forth that the leases were made without publication, and without notice to the appellant. Section 29, supra, does not set forth any procedure concerning the leasing of lands belonging to an irrigation district. It simply authorizes and empowers the board of directors of the district to execute leases of lands which have come into the possession or control of the district.

[1-3] While a number of objections to the amended and supplemental complaint have been interposed by the defendants in the demurrers filed in this cause, it seems unnecessary to consider the specific grounds of demurrer in detail. Both the amended and supplemental complaints contain general allegations only. Such a pleading, in asking for injunctive relief, is almost universally held insufficient.

In 14 Cal.Jur. page 260, § 66, it is said: "A complaint asking injunctive relief should, of course, contain a statement of facts sufficient to warrant the issuance of the writ. The pleader should state the specific facts upon which the relief is sought; inferences, generalities, presumptions and conclusions have no place in such a pleading. Allegations of mere conclusions of law tender no issue and must be disregarded, and a complaint which depends upon such conclusions and does not state the facts upon which the legal conclusions are based, is insufficient upon general demurrer."

[4] After setting forth the fact that the plaintiff is the holder of bonds issued by the district, the number of acres of land

which have come into the possession of the district, the number of acres of land proposed to be leased, and the names of the officers of the district, the fact that the plaintiff has offered to co-operate with the board of directors in leasing and selling the land, the complaint alleges as follows: "Upon information and belief that it is now the purpose of said Board of Directors, under the control and direction of said Moutrey and Clark, to transfer by lease or by deed and for an inadequate consideration the best portions of the lands now owned or that may hereafter be acquired by the District and then to permit the grantees, as previously, to operate said land and appropriate the proceeds for three years without paying anything to the District therefor. And continue the process until enjoined. That said Directors refuse to permit the open and free leasing and sale of the District's lands, at its fair market value, or to permit intending purchasers and lessees of such lands to openly and freely bid for the lease or sale thereof. That refusal of the relief here sought will result in a multiplicity of suits. That upon such refusal it will be necessary for the plaintiff and others interested to bring a separate action to set aside each lease or sale made for an inadequate consideration."

The complaint further alleges that the plaintiff has produced responsible purchasers and lessees for the district's land, but that defendants have refused, and still refuse to consider any such lessees and purchasers, and refuse to sell or lease any land to the persons so offering to buy or lease.

Here, absolutely no specific facts are stated from which the court could infer that the conclusions drawn by the pleader were or are correct. The responsible persons alleged to have been found by the plaintiff are not named. There is nothing in the complaint which indicates that the so-called responsible persons have offered to pay any sum to the district on account of any leases that might be executed, nor does the complaint show that any particular sum is a fair market value to be paid per acre for any leases that might be executed by the district. All that is said is that the proposed lessees were willing to pay the fair market value for the lands that should be leased. Without any further details as to who the so-called responsible persons might be, or the amount of money which the so-called persons were willing to pay per acre

for any lands that might be leased to them by the district, no showing whatever is made upon which the court could base any conclusion that either a just or fair market value was offered to be paid for the leases, nor could the court conclude from the mere general statement that any responsible persons had actually offered to lease any of the lands of the district. There is no showing, either, as we have said, of the fair market value of the leaseholds of the lands held by the district.

While the complaint alleges that the plaintiff learned that the district proposed to lease approximately 1,200 acres of its land at a rental less than that theretofore charged by the district, and commonly charged for similar land, the proposed rental is not mentioned, nor are there any facts stated showing what rental is paid for similar land, or whether the rental paid for similar land is a just and fair market value.

An allegation that the officers of the district are about to transfer by lease or deed, for an inadequate consideration, the best portions of the lands now owned by the district, does not contain any statement of facts upon which the court could conclude that an injunction should be issued. Likewise, the statement that the directors refused to permit the open and free leasing and selling of the district lands at its fair market value, or to permit intending purchasers and lessees of such land to openly and freely bid for the lease or sale thereof, constitutes only a conclusion. No showing is made of what is an inadequate consideration, and no showing of any specific acts constituting refusals on the part of the board of directors as herein alleged.

[5,6] As stated in the case of *Kelsey v. Miller*, 66 Cal.App. 386, 226 P. 630, the general rule is that injunctions may not be granted upon affidavits, the contents of which are stated upon information and belief. That rule applied to the instant case, would be an injunction should not be issued upon a complaint when all the allegations are general, showing that the complaint is founded simply upon information and belief, and contains absolutely no specific instances or facts supporting the conclusions of the pleader.

In the case of *Brown v. Rea*, 150 Cal. 171, 88 P. 713, the court held that a complaint seeking damages or an injunction which failed to show any specific acts, was insufficient

to justify the granting of an injunction, or of a restraining order. The two cases which we have cited, and the reference to Corpus Juris, established that the complaint in this action, for the reasons which we have set forth herein, is insufficient to justify the issuance of an injunction, or to state a cause of action therefor, and that the demurrer of the defendants was properly sustained.

A great many other questions were tendered by the pleadings in this action, but as the judgment must be sustained for the reasons which we have set forth, it is unnecessary to extend the length of this opinion by considering any additional grounds of demurrer interposed by the defendants.

The judgment is affirmed.

I concur: PULLEN, P. J.



26 Cal.App.2d 418

Ex parte BAGWELL.

Cr. 1628.

District Court of Appeal, Third District,
California.

May 18, 1938.

1. Witnesses ⇐18

A writ of "habeas corpus ad testificandum" is a common-law writ which issued when it was necessary to remove a prisoner in order to prosecute or bear testimony in any case or for trial in the proper jurisdiction wherein the act was committed.

[Ed. Note.—For other definitions of "Habeas Corpus ad Testificandum," see Words & Phrases.]

2. Common law ⇐11

Statutes enacted upon a particular subject supersede the common law upon the same subject. Pol.Code § 4468.

3. Witnesses ⇐18

The statute covering the subject of producing evidence from imprisoned witnesses is mandatory, regardless of what may have been the practice under the common-law writ of habeas corpus ad testificandum. Code Civ.Proc. § 1997.

CAL.REP.79-80 P.2d-9

4. Witnesses ⇐18

The statutes relating to the producing of evidence from imprisoned witnesses in criminal cases are not applicable in a civil action by convict against sheriff for injury sustained as result of alleged negligence of sheriff. Pen.Code, §§ 1333, 1346.

5. Depositions ⇐8

Witnesses ⇐2(1)

The provision of the Constitution giving accused the right in a criminal prosecution to compel attendance of witnesses in his behalf does not mean that such witnesses must attend in person, and their deposition may be substituted for the testimony of imprisoned witness. Pen.Code, §§ 1333, 1346; Const. art. 1, § 13.

6. Witnesses ⇐2(1)

Under Constitution giving accused right in criminal prosecution to compel attendance of witnesses in his behalf, production of such witnesses does not issue as a matter of right, but rests in the discretion of the court. Const. art. 1, § 13.

7. Convicts ⇐1, 6

States ⇐119

Witnesses ⇐18, 48(1)

A writ of habeas corpus ad testificandum would not lie to permit prisoner in state prison to testify in a civil action instituted by him against sheriff of county for injuries sustained in county jail as alleged result of sheriff's negligence, since under statutes prisoner's civil rights were suspended and having been convicted of a felony he would be disqualified from testifying as witness, and, trial being for prisoner's benefit, the expense of escorting prisoner to trial would not justify expenditure of public money for private use. Code Civ.Proc. § 1997; Pen.Code, § 673; Const. art. 4, § 31.

Proceeding in the matter of the application of Bruce Bagwell for a writ of habeas corpus ad testificandum.

Writ denied.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and F. C. Cloudsley, Dist. Atty., and Raymond M. Dunne, Deputy Dist. Atty., both of Stockton, for appellant.

Howard B. Crittenden, Jr., of Tracy, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a petition filed by Bagwell for a writ of habeas corpus ad testificandum.

While petitioner Bagwell was confined in a cell in the San Joaquin county jail with one William Lewis, a quarrel arose between the two, during which Lewis struck Bagwell, inflicting the injury hereinafter referred to. Bagwell, after being committed to San Quentin prison, filed a civil suit against the sheriff of the county of San Joaquin for the injury alleged to have been caused by his fight with Lewis, upon the theory the sheriff was guilty of negligence in confining Lewis, whom petitioner alleged was an habitual criminal with a vicious, dangerous and violent character, in the same cell with petitioner. He seeks by this writ to be returned from San Quentin to the county of San Joaquin in order to take part in and to testify in this action against the sheriff.

[1] It is the contention of petitioner that he is entitled to the writ sued upon, which was, under the common law, used for the production before the court of witnesses in pending actions. This writ is defined by Blackstone as one which issues when it is necessary to remove a prisoner in order to prosecute or bear testimony in any case or to be tried in the proper jurisdiction wherein the act was committed.

We may consider the claims of petitioner either as they apply to his rights as a witness or as to his rights as a party to the action. Let us consider first his right as a witness.

In volume 70, page 64, of *Corpus Juris*, it is said in reference to writ of habeas corpus ad testificandum: " * * * The power to issue such process is inherent in the courts, and in some jurisdictions is confirmed, but in others superseded by statute."

[2] There is no doubt but under the common law such rights existed, but where the state has spoken, that supersedes the common law. *Pol.Code*, § 4468.

Section 1997 of the California Code of Civil Procedure apparently has superseded this writ as it applies to a witness, as that section provides: "If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition."

[3] It would appear that the legislature has enacted complete statutes which cover

the subject of producing evidence from imprisoned witnesses and is therefore mandatory regardless of what may have been the practice under the old common law writ.

[4] The action pending in San Joaquin county being a civil case, sections 1333 and 1346 of the Penal Code, which refer to testimony from an imprisoned witness in criminal cases, are not applicable, but even in criminal cases it is within the discretion of the court to order that the testimony of witnesses may be produced by deposition when such witness is confined to a jail or prison.

[5,6] By article 1, § 13, of the Constitution of California, the party accused has a right, in a criminal prosecution to compel attendance of a witness in his behalf, but even that does not mean to attend in person, and depositions may be substituted for the testimony of the imprisoned witness. *People v. Putman*, 129 Cal. 258, 61 P. 961. The court there said that the production of such witnesses does not issue as a matter of right, but rests in the discretion of the court.

In *Castera v. Superior Court*, 29 Cal.App. 694, 159 P. 735, it was held that a defendant in a civil case could not be compelled to wait until the imprisoned plaintiff was released, but had the right to proceed to trial forthwith. It would seem from this case that a plaintiff was not to be released from prison for the purpose of prosecuting a civil action.

The case of *People v. Sebring*, 14 Misc. 31, 35 N.Y.S. 237, cited by petitioner, was a criminal proceeding where witnesses were unwillingly produced before a grand jury in a criminal matter, and is not helpful here.

[7] Turning now to the question of the right of petitioner to appear in person as a party to the action, it must be recalled that defendant is a prisoner in the state's prison, having been convicted of a felony, and under the provisions of the Penal Code, § 673, his civil rights are suspended. It must also be recalled that if the common law was being applied, defendant having been convicted of forgery, which was and is an infamous crime, would be disqualified from testifying as a witness, and therefore, under the common law which he invokes, would not be entitled to the writ sought. Furthermore, the expense of transporting petitioner, together with the necessary guards and maintenance, could not be assessed as a charge against the state

of California, for this trip, being one for the personal benefit of petitioner and not for the benefit of the state of California, would not justify the expenditure of public money for private use. Article 4, § 31, Const.

Viewed also from a practical point of view, it would subject the warden to unnecessary risk, as a prisoner could designedly file a petition in some remote county of the state, and in the act of transportation could, by prearrangement, meet confederates who would effect his release. For that reason also this court should view with caution any order which by this procedure would open the prison doors.

Respondent has raised the question that this court has no jurisdiction to consider this petition as the writ is directed to the warden of San Quentin prison, which is located in Marin county and without jurisdiction of the Third District Court of Appeal.

We do not believe that we need pass upon this question, however, as it is our view of the matter that petitioner is not entitled to the writ, and the same should be and therefore is denied.

We concur: PLUMMER, J.; THOMPSON, J.



NEUWALD v. BROCK, Director of Department of Agriculture et al. *

Civ. 10192.

District Court of Appeal, First District,
Division 1, California.

May 19, 1938.

Hearing Granted by Supreme Court
July 18, 1938.

1. Officers ⇨69

An employee in the State Department of Agriculture who was in a probationary period of service granted to temporary employees who have undergone no competitive examination could be dismissed by the appointing officer. Const. art. 24, adopted in 1934.

2. Officers ⇨69

The provision of the Civil Service Act that "the tenure of every person holding a

position under the provisions of this act" shall be during good behavior, and providing grounds on which civil service employees may be removed, is applicable to probationary employees. St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

3. Officers ⇨69

Under provisions of Civil Service Act prescribing grounds on which civil service employees may be removed, employees are removable for one of specified grounds only. St.1929, p. 252, § 14.

4. Officers ⇨69

Under provisions of Civil Service Act prescribing grounds on which civil service employees may be removed, probationary employee in Department of Agriculture was not removable on ground that he was unsatisfactory to appointing officer. St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

5. Mandamus ⇨168(2)

In proceeding by discharged temporary employee in Department of Agriculture for writ of mandate to require restoration to his position and payment of salary up to the time of reinstatement, wherein the petition alleged existence of money in the state treasury under control of the director of the Department of Agriculture available for payment of such salary, to which an unverified answer was filed, state officers had burden to prove that there were no funds from which salary was payable since they had special knowledge of the facts. St. 1929, p. 252, § 14; Const. art. 24, adopted in 1934.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding on the petition of Edward B. Neuwald for writ of mandamus against A. A. Brock, as Director of the Department of Agriculture of the State of California, and others. Judgment for petitioner, and the respondents appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen., for appellants.

Eustace Cullinan, Eustace Cullinan, Jr., and Herbert E. Wenig, all of San Francisco, for respondents.

TYLER, Presiding Justice.

The petitioner, who had for several years held a temporary position in the state de-

*For subsequent opinion see 86 P.2d 1047.

partment of agriculture and, by virtue of an amendment to the state Constitution, approved and adopted by the electors at the election held on November 6, 1934, was given the status of a probationary employee, was during the term of probation dismissed from his position by A. A. Brock, as director of said department, by whom or by whose predecessor some years before he had been appointed to said temporary position. He brought this action against said director, joining the members of the state personnel board (successor to the civil service commission), William Brownrigg, the executive officer thereof, and Ray L. Riley as state controller, seeking a peremptory writ of mandate, commanding the several named respondents (except Ray L. Riley as controller) to restore him to his position, and commanding the last named to pay him the amount of salary he would have earned but for his removal up to the time of reinstatement, if such should be decreed. In addition he sought general damages for his removal.

Included in the petition were allegations to the effect that at no time prior to his dismissal did A. A. Brock, the director of the department, nor any other of his superiors express or indicate to petitioner any dissatisfaction with or criticism of his conduct or capacity as such employee; that on January 24, 1935, Brock dismissed him by a written communication, in which he stated as his reason therefor that petitioner's conduct or capacity as such probationary employee had not been satisfactory to him; that on January 18, 1935, Brock, by letters couched in similar terms, dismissed two other probationary employees of the department, and on January 26th four others, and that, as in his own case, no dissatisfaction with their services had been expressed by Brock to them or either of them. No actions have been brought in the other cases. It was further alleged that the reason so stated by Brock for the dismissal of petitioner was not a valid reason for the dismissal of a civil service employee and it was not one of the causes, grounds or reasons specified in section 14 of the Civil Service Act, Stats. 1913, p. 1035, as amended Stats. 1929, pp. 251, 252, as the only causes for which a person holding a position under the provisions of the act might be dismissed; and that the reason so stated was untrue and was a pretext adopted by said Brock in order to frustrate and defeat the intent of article 24 of the state Constitution and to prevent petitioner

from acquiring a permanent civil service status in said department; also that Brock, in dismissing petitioner, was actuated by personal motives and political considerations and by malice. In connection with his demand for payment of salary it was alleged in the petition that at all times the director of the department of agriculture had under his control, and there was in the state treasury, a sum of money available for that purpose sufficient to pay said salary.

The defendants filed an answer, unverified, in which they denied that the reason given by Brock for the dismissal of petitioner was untrue, or that it was a pretext resorted to in order to defeat the intent of said article 24 of the Constitution or to prevent petitioner from acquiring a civil service status, or that he was actuated by personal motives, political considerations or malice. The allegations as to the availability of funds under the control of the director of the department of agriculture for the payment of petitioner's demand were also denied; and it was affirmatively alleged that the dismissal was made under and pursuant to the terms of rule 9, sections 1 and 2, of the civil service commission (board of personnel).

The court made and filed findings of fact and conclusions of law. These were in favor of the petitioner with the exception of the charge that the dismissal was malicious, upon which the court found in favor of the defendants. It ordered a peremptory writ of mandate to issue reinstating the petitioner and that he be paid the amount of salary he would have earned but for his dismissal.

The defendants have taken this appeal, and in support thereof attack as not supported by the evidence certain of the court's findings, namely, findings XIV and XXI, and also the refusal of the court to find that the principal reason for the rule contained in section 9 of the Civil Service Act, St. 1913, p. 1041, requiring the reasons for dismissing a probationary employee to be stated in writing and filed with the commission, to be in accordance with their contention, and its refusal to find that in dismissing petitioner, Brock was not actuated by personal motives or political considerations.

The following is the material part of finding XIV: "The reason so stated by A. A. Brock, as director of the Department of Agriculture, for the dismissal of Edward B. Neuwald * * * is not a valid or

sufficient reason for the dismissal of a civil service employee * * * holding a position under the State Civil Service Act, and is not one of the causes, grounds or reasons specified in section 14 of the State Civil Service Act as the only causes for which a person holding a position under the provisions of the State Civil Service Act may be dismissed, and is not a reason or cause for such dismissal sufficient to satisfy the requirements of section 14 of the State Civil Service Act or of rule 9 of the State Civil Service Commission. The reason so stated by A. A. Brock, as director of the Department of Agriculture * * * and his statement of his reason, was and is untrue, and was and is a pretext adopted by respondent A. A. Brock, acting as director of the Department of Agriculture, in order to frustrate and defeat the intent and purpose of article 24 of the Constitution of California and to prevent Edward B. Neuwald from acquiring a permanent civil service status. * * * In so dismissing Edward B. Neuwald the respondent A. A. Brock acted in violation of law but he was not actuated by personal malice."

[1] It is conceded on behalf of the petitioner that being in a probationary period of service (created under the provisions of article 24 of the Constitution and granted to temporary employees who had undergone no competitive examination, and consequently had never had any status on an eligible list) he could be dismissed by the appointing officer; but it is contended, first, that he could be dismissed only for one or more of the reasons enumerated in section 14 of the Civil Service Act, as the trial court found; and second, if he could be dismissed for any other reason, that specified by Brock was nevertheless insufficient.

Section 14 of said act, so far as here material, reads as follows: "The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed, demoted, suspended without pay or with reduced pay, transferred to another position in the same class, reprimanded, or restored to his position with such pay as may be equitable under a procedure in conformity with the provisions of this section which shall be set up by the commission in its rules and regulations, for any of the following causes: incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, im-

proper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission. * * *

"The appointing power * * * may file charges against any person employed by the state under and subject to the provisions of this act, for dismissal or other corrective action for any or all of the causes hereinbefore provided and suspend such employee from service until such time as the charges against him shall have been heard or investigated by the commission and a decision rendered. Such charges must be made in writing and clearly state the specific act or acts of the employee constituting such cause * * *." The section goes on to provide for service of the charges upon the employee, and a procedure for their hearing and determination by the commission or a commissioner or the chief examiner or any agent of the commission, and that the decision of the commission shall be final.

[2-4] It is quite obvious that in respect to the general language found in the section, namely, "the tenure of every person holding a position under the provisions of this act", it applies not only to the employees who have passed from their probationary period to permanent tenure, but is also applicable to probationary employees. When the statute prescribes the grounds upon which civil service employees may be removed, they are removable for one of those specified grounds. Here the language of the section points out for what offenses an employee may be removed, and the mere fact that petitioner was unsatisfactory to Brock is not a sufficient reason under the act for his removal. The trial court took evidence as to the conduct of petitioner during the long period of his employment and found him at all times prior to his dismissal to be without fault. We are of the opinion that the evidence fully supports the judgment.

[5] It is further claimed that there is no evidence supporting finding XXI, that there were funds in the treasury to meet the demand. Petitioner pleaded the existence in the state treasury of a sum of money sufficient for that purpose. While an unverified answer was filed to the verified petition, the trial court found that there was a sufficient sum in the state treasury available for the purpose, which the judgment orders to be used for that purpose. Under these circumstances the burden was

upon the state officers to prove there was no fund as they had special knowledge of the facts.

The judgment is affirmed.

I concur: KNIGHT, J.



26 Cal.App.2d 326

DEXTER v. ANKIEWICZ.

Civ. 11717.

District Court of Appeal, Second District,
Division 2, California.

May 12, 1938.

Hearing Denied by Supreme Court
July 11, 1938.

1. Contracts Ⓒ32

Where parties understand that no contractual relationship is to exist until terms of their agreement are reduced to writing and signed by them, a binding contract does not arise until writing evidencing agreement has been executed by parties.

2. Contracts Ⓒ22(1)

Where it was clear from letter written defendant by plaintiff stating that inclosed contract when signed by defendant and returned would give plaintiff power to represent defendant, and from other correspondence, that both parties contemplated that acceptance of plaintiff's offer to act for defendant should be signified by signing and returning contract, which defendant returned unsigned, defendant did not accept offer by merely writing that he was willing to sign, and therefore no binding contract was created.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Stephen B. Dexter, doing business under the name and style of the Heirs Research & Recovery Bureau, against T. Ankiewicz, also known as Tadeusz Ankiewicz, to recover damages for breach of an alleged contract giving plaintiff the power to represent the defendant in proceeding for settlement of an estate. Judgment for plaintiff, and defendant appeals.

Judgment reversed.

Schell & Delamer, of Los Angeles, for appellant.

James W. Bell, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for breach of an alleged contract defendant appeals.

The pertinent facts are:

May 17, 1935, Edmund Ankiewicz died in Los Angeles county. The public administrator of Los Angeles county filed a petition for letters testamentary of the estate of Edmund Ankiewicz. In this petition it was alleged that the heirs at law of the decedent were unknown and that no last will and testament had been found.

Subsequently plaintiff, who was engaged in the business of searching for lost heirs caused an advertisement to be published in a newspaper in Poznan, Poland, with reference to the estate of decedent. In response to the aforementioned advertisement on November 5, 1935, defendant wrote to an agent of plaintiff in Connecticut stating that he was the brother, next of kin, and only heir at law of decedent. A copy of this letter he forwarded to plaintiff in Los Angeles, and in response plaintiff wrote defendant a letter reading:

"We Find the Lost When Many Others

Fail

"Stephen B. Dexter,
"President and Manager

"Heirs Research and Recovery Bureau
"316 Homer Laughlin Building

"Los Angeles, California
"November 23, 1935.

"Mr. T. Ankiewicz, .

"Strezelecka 3a str.,

"Poznan,

"Poland

"Dear Sir:

"Our Connecticut agent, Mrs. Emma Greve, has forwarded to us your very interesting letter of the 5th inst., and we thank you for the same.

"We have read your communication with care, and it is possible that you are related to the particular Edmund Ankewich or Edmond Ankevich (Ankiewicz). The differences in spelling of the name can, of course, be easily accounted for since our American way of spelling family names often differs from those of the Europeans.

"It is most important that you protect your interests in the matter on the theory that he is your brother, and we are enclosing a form of Survey of Family Relationship which we will ask that you fill in to the best of your ability and sign and return to us. *We also enclose our contract, which when signed by you and returned to us will give us the power to represent you and protect your interests.* It is not necessary that you have this contract signed before a notary public, and all that is required is to have two witnesses sign on the lines provided for that purpose. This will save you the expense of a notary fee. You will note from our contract that you are put to no expense whatever. We take care of all that, and if we fail to make the recovery for you then we stand all the expenses incidental to the matter, and you are not responsible in any way whatever. In other words we have to make the recovery for you, before we receive our commission. In order to prevent delays, deal directly with us.

"We wish to state that we have been in the research and recovery business for a number of years, specializing in estate work, and are thoroughly competent to look after your interests. We have been uniformly successful, and can serve you faithfully and well. We are members of the Los Angeles Chamber of Commerce, and are licensed and bonded by the State of California. *Upon receipt of your Survey of Family and the Contract, we will immediately proceed to act in your behalf.* If there is any other information we desire from you, we will advise you later.

"Very sincerely,
"[Signed]

"Stephen B. Dexter

"SBD/

"Read the Inheritance News—Published Quarterly—\$1.00 a year.

"News Worth While.

"Your Chance Inquiry in Our Behalf May Mean Thousands in Money for You—Read 'Uncovering Millions in Wealth.'"

The contract mentioned in the foregoing letter was a printed form and read:

"Heirs Research & Recovery Bureau,
(Stephen B. Dexter, Manager)

"Dear Sirs:—

"I am in receipt of your offer to recover whatever portion may be due me from the Estate of Edmund Ankewich (Edmond Ankiewicz), and I hereby assign unto you one-

third of such portion for your services in connection with this case, and I hereby authorize the Heirs Research and Recovery Bureau to Collect and protect my interest; and I give and grant unto your representative Stephen B. Dexter the right to act as my Attorney in fact in this specific Estate matter, and I hereby ratify all that he shall do in directing the distribution of any and all assets in connection with my portion of said Estate, it being understood and agreed that all expenses of whatever nature in connection with said recovery shall be advanced for me by the Heirs Research and Recovery Bureau and deducted at the time of distribution, and if distribution cannot be made, then the Bureau shall bear the loss of all moneys so advanced. The above assignment of one-third is to the Heirs Research and Recovery Bureau, or their assigns.

"Witness:

"_____
"_____

"Signature _____

"Address _____

"Subscribed and sworn to before me, this _____ day of _____, 193—.

"Notary Public in and for the County
of _____ State of _____.

"Approved:—

"Heirs Research & Recovery Bureau

"By Stephen B. Dexter Manager."

December 20, 1935, defendant wrote to plaintiff a letter reading in part:

"In reply to your letter of the 23rd. ult. I let you kindly know, that I am willing to sign and return you the contract sent me by you, and also to intrust you with the power to represent me and protect my interests, when you before will kindly give me some information, particularly of what will be composed the inheritance after my brother E. Ankewich and what value likely it represents in cash.

"I note, that I do not care for it, to reach, in what place the inheritance is, I will only know his value."

December 21, 1935, and before receipt of the letter just mentioned plaintiff cabled defendant as follows:

"Forward agreement immediately as other heir claimants."

After receipt of defendant's letter dated December 20, 1935, plaintiff on January 11, 1936, cabled defendant thus:

"Estate about sixty five hundred dollars proceeding to protect your interests authority your letter December 20 *forward contract immediately*. Heirs Research, Los Angeles."

The foregoing cable was followed by a letter from plaintiff to defendant dated January 18, 1936, reading in part as follows:

"Referring to our previous correspondence, we are still awaiting the receipt of the Survey of Family Relationship and the Contract. In our letter, we impressed you with the importance of this on Nov. 23rd, and again in our cables of Dec. 21st and Jan. 11th. While we have already proceeded to look after your interests, and took your letter of Dec. 20th as our authority for the same, as we mentioned in our last cable, at the same time we need the other documents referred to above.

"We have received letters from parties claiming that they represent you as attorneys, but you never mentioned them to us, and in the absence of such advices from you, we cannot recognize them in our relationship with you. The last letter is from an attorney by the name of Dr. J. Kaczmarczyk of Krynica, who states he holds Power of Attorney from you. We cannot understand this, as you had dealt with us, and given us the authority to act for you.

"You do not need any attorney there, as we are fully equipped to take care of your interests and to serve you faithfully and well. We have been in business a number of years, and have an international reputation in our class of work. We are licensed and bonded and reliable, and you need have no hesitancy in entrusting this matter to us. *So we urge that you give this matter the attention it so well deserves, and send on the Contract and the Family Survey Form. It is most important that this has been done immediately.*"

In response to the foregoing letter on February 15, 1936, the defendant wrote plaintiff a letter reading thus:

"In answer to yours of the 18th ult. *I beg to return you herewith unsigned the forms you send me, and to inform you that I was obliged to submit the question of my late brother's inheritance to the Polish Consulate General at Chicago through the Court of Justice of this town, giving them also full power of attorney since the 31 January last.*

"I have given no other authorisation or power whatever neither to lawyers nor to any other person and, if any steps have been taken in this matter, he has taken them has done so of his own initiative and at his own risks."

April 28, 1936, plaintiff again wrote to defendant a letter reading as follows:

"We are calling your attention to your letter of February 15, 1936, in which you returned the forms of deposition which had been forwarded to you and we note what you state to the effect that you were obliged to submit the question of your late brother's inheritance to the Polish Consulate General at Chicago, and giving your Power of Attorney to proceed in your behalf.

"You also stated that you have not authorized any attorney or any other person to take any steps in the matter.

"In connection with the above paragraph of this letter, we call your attention to your letter of December 20, 1935, in which you state your willingness to entrust us with the power to represent you and to protect your interests, provided we give you the information as to the value the estate represented. Following the receipt of this letter, we cabled you under date of January 11th giving you the amount of the estate and telling you we were proceeding to protect your interests as you had indicated in your letter you desired us to do.

"Thereupon, we acted in good faith, had your appearance made in the estate, secured the deposition which you were to give in proof of your heirship and in every way acted for your interest. Considerable time has elapsed since your letter of February 15th, hearings concerning the estate have come up on two occasions and no one connected with the Polish Consulate has appeared in your behalf. However, the attorney who is looking after your interest under the power given to us by your letter of December 20th, has appeared and has continued these hearings so that your interest might not be impaired. So Mr. Ankiewicz, it appears to us that your interests would be best served by giving us further instructions in your behalf so that you may be properly represented. We are, therefore, returning the deposition so that you may have it properly filled in and mailed back to us.

"Trusting that you will appreciate the situation and act promptly through us for

your own protection, by further advice, we beg to remain."

Again on June 27, 1936, plaintiff wrote defendant a letter reading thus:

"I have been going over some of the letters in your case, and especially the letter where you authorize us to proceed if we could send to you a statement as to the amount of money involved.

"I have carefully inquired from the Court House records, but note that no one has appeared outside of our attorney, and now I am asking you again, since time is passing rapidly, to fill in the papers that were sent you for the purpose of proving your relationship to one Edmund Ankiewicz.

"I am sure, if you knew how important it was to finish this matter up, and if you knew as we know that delays in matters of this kind permit the passing of the estate to the State of California, you would appreciate the earnestness with which I write and urge upon you the necessity of filling in the papers that were sent you.

"In filling in the papers, please be sure and sign the contract before two witnesses, and fill in the questionnaire showing your relationship to the said Edmund Ankiewicz (Ankewich).

"Hoping to hear from you without delay, we remain."

Finally on October 28, 1936, plaintiff wrote defendant this letter:

"We are writing in reference to the Estate of your brother, Mr. Edmund Ankewich, which is being probated in this County.

"You have doubtless been informed that we have filed a claim against this estate because of the understanding between us, and which you did not carry out according to the understanding and the contract, you having turned the matter over to other parties to represent you, after engaging our services, and after we had entered your claim to the estate of your brother and was representing you therein. We disliked to do this, but it was our only recourse under the circumstances, and we felt thoroughly justified in doing so.

"Of course, this means that the estate will be tied up for some time and till the matter is adjudicated in the Courts. If you care to settle the matter with us instead of waiting an indefinite period, you can so indicate to us, and the matter can be disposed of at an early date.

"P. S. Our claim is the commission of one-third of the amount of the estate which would be coming to you."

This is the sole question necessary to be determined:

Does the foregoing correspondence constitute a binding contract between plaintiff and defendant?

[1] This question must be answered in the negative. Where the parties understand that before a contractual relationship shall exist the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. *Mercantile Trust Co. v. Sunset Road Oil Co.*, 176 Cal. 461, 469, 168 P. 1037; *Spinney v. Downing*, 108 Cal. 666, 668, 41 P. 797.

[2] In the instant case it is clear from the portions which we have italicized of the correspondence set forth above that both plaintiff and defendant contemplated that acceptance by defendant of plaintiff's offer should be signified by defendant's signing and returning the contract which accompanied plaintiff's letter to defendant dated November 23, 1935.

Therefore, applying the above-mentioned rule of law to these facts, it is evident that defendant did not accept plaintiff's offer in the manner contemplated by the parties, and hence defendant never entered into a binding or subsisting obligation with plaintiff.

In view of our conclusion, it is unnecessary for us to discuss the other points presented by counsel.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

26 Cal.App.2d 371

PEOPLE v. ROGERS.

Cr. 3078.

District Court of Appeal, Second District,
Division 2, California.

May 17, 1938.

Hearing Denied by Supreme Court
June 16, 1938.

1. Criminal law $\hookrightarrow$ 369(1)

In prosecution for committing lewd and lascivious acts on a female child, evidence that defendant had perpetrated similar acts with persons other than the prosecuting witness is inadmissible. Pen.Code, § 288.

2. Witnesses $\hookrightarrow$ 277(5)

In prosecution for commission of lewd and lascivious acts on a female child, permitting prosecution to introduce, over objection, on cross-examination evidence that on a prior occasion defendant had entered a plea of guilty to contributing to delinquency of a minor predicated on charge that he had committed a lewd act with a female child other than either of the prosecuting witnesses, after defendant had testified that he had never been rude to children, was prejudicial error. Pen.Code, § 288.

CRAIL, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

William F. Rogers was convicted of a violation of Pen.Code, § 288, and from the judgment of conviction and an order denying his motion for a new trial, he appeals.

Reversed, and new trial ordered.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Harry D. Hottel and Jesse R. Shafer, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Appellant was convicted after trial by jury of violating section 288 of the Penal Code on three different occasions. This appeal is from the judgment and order denying his motion for a new trial.

The prosecution (respondent) introduced evidence tending to prove the following facts:

July 25, 1937, appellant, while seated in an automobile with a female child twelve years of age, committed an act prohibited by section 288 of the Penal Code. Again,

October 3, 1937, appellant with the same child while in the basement of his home committed an act prohibited by the section of the Penal Code above referred to, and September 25, 1937, he committed a similar act with another female child eight years of age in the basement of his home.

Appellant relies for reversal of the judgment on this proposition:

It was prejudicial error for the trial court to permit the prosecution to introduce evidence that appellant had previously entered a plea of guilty to contributing to the delinquency of a minor (a misdemeanor) predicated upon the charge that he had committed an act prohibited by section 288 of the Penal Code with a female child other than either of the prosecuting witnesses.

This proposition is tenable. After appellant had taken the witness stand and specifically denied having committed any of the acts charged against him the following cross-examination by the deputy district attorney ensued:

"A. That morning both of the children were—had been over to the yard when I was cleaning up the front yard, and on that particular occasion I asked them—they had asked me to take them to the ball park and I never have been rude to children, and I did not want to be rude to anyone's children—

"Q. Wait just a second. May I have the first part of that answer, beginning with 'I have never been rude to children'?

(Answer read.)

"Q. 'I have never been rude to children'; is that your statement?

"A. That is right.

"Q. In the statement, 'I never have been rude to children', you mean you never have mistreated any children at all?

"A. That is right.

"Q. As a matter of fact, in this very Superior Court, you have entered your plea of guilty to contributing to the delinquency of a minor growing out of a charge of violating Section 288, did you not?

"Mr. Bird: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

"The Court: Overruled. Answer the question, please.

"A. I did for a specific reason, and it was not entirely personal at that time.

"Q. By Mr. Burgess: But you were charged in this court with the very same offense that you are now charged with and you entered your plea of guilty to con-

tributing to the delinquency of this child in this very court?

"Mr. Bird: The same objection.

"Mr. Burgess: Now, you can answer that yes or no.

"The Court: Objection overruled.

"A. I did."

[1] The law is settled in California that in a prosecution for committing lewd and lascivious acts prohibited by section 288 of the Penal Code evidence that defendant has perpetrated similar acts with a person or persons other than the prosecuting witness is inadmissible. *People v. Asavis*, Cal.App., 71 P.2d 307; 16 C.J. (1918) 610, § 1194.

In *People v. Asavis*, supra, a case in its facts analogous to the one before us, Mr. Justice Houser at page 309 thus states the rule:

"Not only by the appellate courts of the state of California, but also by many other courts having similar jurisdiction, it has been ruled that upon the trial of a defendant on a charge of the felonious commission by him of a sexual offense, evidence of like commission of other similar acts by the defendant with persons other than the prosecuting witness ordinarily is inadmissible. The case of *People v. Anthony*, 185 Cal. 152, 196 P. 47, was one in which the defendant therein was charged with the commission by him of an offense of the same character as that here involved. One of the issues that was presented on that appeal related to the admissibility of evidence of the commission of similar acts by the defendant with persons other than the prosecuting witness. The court gave the question full consideration, and, in part, said: 'Our law wholly rejects this character of testimony, not because it does not tend to prove the truth of the charge, but because of a just regard for the rights of the defendant, who, if confronted by such witnesses, instead of being compelled to stand trial on one charge made against him, would be confronted by half a dozen or more charges. Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness.'"

[2] Applying the rule of law above stated to the uncontradicted facts in this case, it is clear that the trial court committed prejudicial error in permitting the prosecution to introduce over objection evidence that on a prior occasion defendant

with a minor female child other than either of the prosecuting witnesses had committed an offense interdicted by section 288 of the Penal Code.

Lord Chief Justice Hale's repeatedly approved comment relative to the crime of rape may well be applied to charges of violating the section of the Penal Code here under discussion, to wit:

"It must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent;" and that we should "be the more cautious upon trials of offenses of this nature where in the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." 1 Hale P.C. (1736) 635, 636.

For the foregoing reasons the judgment and order appealed from are and each is reversed and a new trial is ordered.

I concur: WOOD, J.

CRAIL, Presiding Justice (dissenting).

I dissent:

The defendant saw fit on his part to drag in before the jury his statement that he had never been rude to children, which, in effect, was a statement that he had never been guilty of similar prior conduct as that upon which he was being tried. It is the custom for the district attorney to attempt to impeach the defendant on cross-examination by showing that some of his statements upon the witness stand are false. In the instant case, with the defendant refusing to give direct answers and answering as he did, some leeway should be taken. The cross-examination in regard to the other offense was manifestly not offered "to prove the specific crime charged", but was offered solely for the purpose of contradicting the testimony of the defendant himself as to his prior conduct. If the defendant saw fit to place before the jury his own testimony with regard to such prior conduct he should not be entitled to a new trial because the People were able, out of his own mouth, to disprove the truth of his statement. In a running cross-examination during the trial there manifestly must be some leeway,

and I do not think that the admission of this evidence would merit reversal of the case in view of article 6, § 4½, of the Constitution, which commands us, among other things, that no judgment shall be set aside or new trial granted in any case on the ground of the improper admission of evidence unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. I think the evidence complained of is incidental and trivial. This is not such a case as where the state undertakes to prove similar offenses as a part of its case in chief. For such cases see *People v. Asavis*, Cal.App., 71 P.2d 307, and *People v. Anthony*, 185 Cal. 152, 196 P. 47, the two cases upon which defendant mostly relies.



26 Cal.App.2d 338

WILLS et ux. v. PRICE et al.

Civ. 2214.

District Court of Appeal, Fourth District,
California.

May 13, 1938.

Hearing Dismissed by Supreme Court
July 12, 1938.

1. Negligence ⇨121(1)

A customer seeking to recover for injuries sustained in furniture store when roll of linoleum fell upon her as alleged result of vibration caused by walking on floor or other vibrations of building, without allegation of general negligence, had burden to show specific negligence alleged.

2. Negligence ⇨121(3)

In customer's action for injuries sustained in furniture store when roll of linoleum fell upon her as alleged result of vibration, where there was no affirmative evidence that floor vibrated or that customer touched roll of linoleum, fact that no witness noticed vibration would permit a limited application of doctrine of *res ipsa loquitur*, notwithstanding that customer had burden of showing specific negligence alleged.

3. New trial ⇨71

Where customer alleged injuries were sustained in furniture store as result of vi-

bration causing roll of linoleum to fall upon her and only evidence that such vibration had taken place was inference which might be drawn by limited application of *res ipsa loquitur* doctrine, sufficient conflict of evidence as to such vibration was raised to warrant trial court in granting a new trial on ground that evidence was insufficient to justify verdict for defendants.

4. Negligence ⇨125

In customer's action for injuries sustained in furniture store when roll of linoleum fell upon her as result of alleged vibration, evidence of previous accidents occurring under substantially the same general circumstances would be competent and if defendants were shown to have notice of such accidents, as tending to establish negligence.

5. Evidence ⇨242(5)

In customer's action for injuries sustained when roll of linoleum fell upon her in furniture store testimony as to statements made by employee of store concerning previous occurrences was properly excluded where employee was not shown to have any connection with the handling of linoleum, so as to come within the rule that notice of a condition to an agent is notice to the principal.

6. Principal and agent ⇨177(4)

The rule that notice of a condition to an agent is notice to the principal is founded on the existence of such duty in the agent in respect to the condition as will make him in regard to it the principal's representative.

7. Evidence ⇨317(2)

In customer's action for injuries sustained in furniture store when roll of linoleum fell upon her, testimony as to statements made by defendants' employee with respect to similar occurrences before and after accident, and not part of the *res gestæ*, was properly excluded as hearsay.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Lewis C. Wills and wife against Fred S. Price and others, doing business under the fictitious name of the Price Hardware & Furniture Company, for injuries sustained by the wife in defendant's hardware and furniture store and for loss of services resulting from such injuries. Judgment for the defendants, and from an

order granting a new trial, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, and Halbert & Stone, of Porterville, for appellants.

John T. Fuller, of Porterville, for respondents.

HAINES, Justice pro tem.

For a long time appellants Fred S. Price, B. L. Price and Kathleen M. Warden have been engaged, under the fictitious name "Price Hardware and Furniture Company", in conducting a hardware and furniture store in a two-story building at Porterville. The building was erected in 1890. A room on the second floor has been and was, on October 25, 1935, used for storage and display of linoleum in rolls. Many of these rolls were of six-foot wide linoleum which were placed on end along the south side of the room. Other rolls of nine-foot wide linoleum, and sometimes of linoleum of even greater width, were laid on the floor. Between the rolls which stood on end and those laid on the floor there was an aisle or pathway extending across the room. There is evidence to the effect that the structural conditions of the building had not been changed after it was put up except that one of the steel uprights, formerly existing as a support to a girder beneath a portion of the upper floor, including the linoleum room, had been removed, resulting, according to the testimony of one Nyby, a building contractor, in a sag, leaving this part of the upper floor uneven and sloping from both the south and north walls toward the center. The result, according to this witness, is a perceptible vibration when one walks across this floor. Two other witnesses, a building contractor named Bishop and the city building inspector, one Hamilton, testified that they are familiar with the building and that walking across this floor produces a perceptible vibration. The testimony of appellant Fred S. Price and of one Hopkins, an employee of appellants, as well as of various others, is that they have noticed no such vibration from that cause, though Price says that it does occur when trucks of linoleum are rolled along the floor. Nyby testified that while he considered the building all right as a whole he thought this part of it unsafe. On the day referred to plaintiff and respondent Lydia E. Wills, together with her daughter, Vera Mortensen, went to the store and Mrs. Wills went upstairs and

looked at a roll of linoleum which she decided to buy for her daughter. After going below she returned again with her daughter to the linoleum room to show to her daughter the roll which she had selected and, according to her testimony, after it had been examined, the two walked along the aisle or pathway, above referred to, between the rolls of six-foot linoleum standing on end and the rolls of wider linoleum lying on the floor until, as they were nearing the center of the line of upright rolls one of these, weighing from 120 to 125 pounds, amounting to only about one-third of its original weight, fell, hitting Mrs. Wills and throwing her across a roll of nine-foot linoleum lying on the floor on the opposite side of the aisle, causing her severe injuries, including a fractured hip. There is some testimony to an admission on Mrs. Wills' part that she had placed her hand on the top of this particular roll of linoleum to look behind it and see other patterns, whereupon it fell over on her, but she denied making any such admission and testified that she did not put her hand on the roll and we must, in support of the trial court's action assume that it believed her testimony on that subject to be true.

On the other hand, there is testimony that one of the defendants admitted that the linoleum that fell on Mrs. Wills had been rolled into a spiral form and stood on its smaller end. Not only is this admission denied but appellants claim that to stand on end a roll of linoleum in such a condition at all would be physically impossible.

The present action was brought by respondents, Mrs. Wills and her husband, to recover from appellants general damages for the injuries so sustained by Mrs. Wills, as well as special damages for expenses incurred in treating them, and for loss to the husband of the wife's services, all of which are in the amended complaint claimed to have resulted from appellants' negligence. Defendants and appellants are alleged, in each of the two counts of the amended complaint to have been negligent, in that, for the purpose of displaying it to their invitees and customers, "said linoleum had been by said defendants negligently and carelessly rolled and stood upon end and negligently and carelessly permitted to remain on the floor in such manner that the same could and did, as a result of the vibration caused by walking across said floor, or other vibrations of said building, fall upon and strike the plaintiff causing

her to be thrown to the floor and upon another roll of linoleum carelessly and negligently by the defendants permitted to remain lying upon the floor in such position or place that plaintiff could be and was thrown thereon." After the filing of an answer denying the negligence complained of and alleging contributory negligence on Mrs. Wills' part, the case was tried to a jury and resulted in a verdict and judgment for the defendants, whereupon the plaintiffs and respondents moved the court for a new trial on the two grounds of insufficiency of the evidence to justify the verdict and errors of law occurring at the trial and excepted to by plaintiffs. The motion was granted, as the court's minutes recite, "on all of the grounds set forth in the written motion for a new trial", and it is from the order granting the motion that the present appeal is taken.

Appellants concede that on an appeal from an order granting a new trial this court may not review mere conflicts in the evidence but they rely in the circumstance that instead of alleging negligence generally the amended complaint specifies, as above set out, the particular negligence claimed to have existed, and, as is claimed, is to be treated as though it alleged in substance that "the linoleum was rolled and placed on end so that it would safely stand where it was placed unless there should be vibration of the floor caused from walking across the floor or other vibration of the building." Appellants claim that as a legal consequence, all applicability of the doctrine of *res ipsa loquitur* to the case is necessarily excluded and that plaintiffs cannot recover without showing both that the linoleum was so negligently placed that vibration would cause it to fall and also that there was in fact in this particular instance vibration which did cause it to fall. As said in *Marovich v. Central California T. Co.*, 191 Cal. 295, 305, 216 P. 595, 600:

"The general rule is that—'Where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of *res ipsa loquitur* does not apply.' *Connor v. Atchison, T. & S. F. Ry. Co.*, 189 Cal. 1, 207 P. 378, 22 A.L.R. 1462, and cases cited. The foregoing statement of the rule in the cited case was followed by the qualification that—'Where the explanation leaves it doubt-

ful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine.'"

The court says further (citing numerous authorities from the decisions in this state) that:

"Regardless of the effect of the foregoing qualification upon the general rule, it is clear that, where the plaintiff in his complaint makes no general allegation of negligence or no allegation of general negligence, instructions applying the doctrine of *res ipsa loquitur* should not be given. This must be so, for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint."

[1] Since, then, the amended complaint in the instant case contains no allegation of general negligence, appellants are correct in saying that, to justify any recovery, respondents were bound to show the specific negligence alleged. The gist of the complaint in that behalf, however, was the claim that the rolls of linoleum were so placed that the upright rolls would be likely to topple over; and, that if they did topple over, they would fall on the other rolls; to which is added "as a result of the vibration caused by walking across said floor, or other vibrations of said building." Assuming that the last-quoted language involves a concession that the upright rolls were so placed that they would not of themselves fall over without some "vibration" of the floor, it is still to be observed that the "vibrations" referred to, as apt to make them fall, were not alone those to be caused by walking across the floor but also "other vibrations of said building."

[2, 3] It must be conceded that the testimony of Mrs. Wills itself showed that she had not, in walking across the floor, particularly noticed any vibration nor does her daughter, Mrs. Mortensen, claim to have noticed any. Shortly after the accident, not only Mrs. Wills, but also her sister, Mrs. Willits, one Pauline Thomas, an employee of the store, and appellant Fred S. Price, were all for a time together in the linoleum room and while they were there Hopkins brought a wheeled chair in which Mrs. Wills was trundled away. It does not appear that any of them particularly noticed at the time any vibration or, if there was any, that it caused any other rolls of linoleum to topple over. In these circumstances, we are asked to hold that there is no sub-

stantial evidence that at the time of the accident any such vibration of the building occurred as is relied on in respondents' pleading as sufficient to have caused or as actually having caused the fall of the roll of linoleum which hit Mrs. Wills. The court, however, had the right to believe Mrs. Wills' statement that she had not touched the roll. If she had not, then, even though respondents were precluded by their pleading from claiming that the roll was so insecurely placed that it could topple over merely from its own weight, and though they were confined to showing that the immediate cause of its toppling over was the vibration of the floor, still the circumstance that no witnesses noticed such vibration would be inconclusive and there would still be room for a limited application of the *res ipsa loquitur* doctrine (*Phillips v. Southern California Edison Co., Ltd.*, Cal.App., 72 P. 2d 769) whereby the trial court might have concluded that there had been a vibration of the floor, though there were no other affirmative evidence that such vibration had taken place than such inferences as the *res ipsa loquitur* doctrine might justify. In fine, we cannot say that there is not sufficient conflict in the evidence, going to the gist of the cause of action, as to require us to sustain the trial court in its right to conclude that the evidence was insufficient to justify the verdict.

[4-7] As appears from its order granting a new trial, the superior court not only reached that conclusion but concluded also that errors at law had been committed at the trial. As justifying this latter conclusion, respondents rely on the court's refusal to admit evidence that rolls of linoleum had, in the same room, toppled over and fallen on other occasions, both before and after the day of the accident, and also upon its refusal to allow Mrs. Wills and her sister, Mrs. Willits, to testify to conversations with the said Pauline Thomas, an employee of the store, in which it is claimed that the latter admitted knowing of such occurrences. With respect to these matters we entertain no doubt that it would be competent to admit evidence of previous accidents, occurring under substantially the same general circumstances as the one under investigation, both as tending to show the cause of the latter, and, if appellants were shown to have notice of them, as tending to establish negligence on their part. *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 P. 972; *Rafferty*

v. City of Marysville, 207 Cal. 657, 663, 280 P. 118; *McCormick v. Great Western Power Co.*, 214 Cal. 658, 8 P.2d 145, 81 A. L.R. 678; *Norton v. City of Pomona*, 5 Cal. 2d 54, 59, 53 P.2d 952; *Gorman v. County of Sacramento*, 92 Cal.App. 656, 268 P. 1083. The rule as to evidence of subsequent accidents is different. *McCormick v. Great Western Power Co.*, supra, page 668, 8 P.2d 145. We are unable, however, to find from the record any instances in the present case of the rejection of testimony respecting such previous occurrences, save only the court's refusal to allow Mrs. Wills and Mrs. Willits to testify to the statements above referred to, claimed to have been made by the said Pauline Thomas. A similar inquiry attempted to elicit from Mrs. Wills' daughter, Mrs. Mortensen, evidence of like statements on Mrs. Thomas' part but she could not remember hearing them. This proffered testimony on the part of Mrs. Wills and Mrs. Willits was in our opinion properly excluded, because it does not appear, even though Mrs. Thomas was an employee of the store, that she had any connection with handling the linoleum or keeping in order the room where it was handled, and the rule that notice of a condition to an agent is notice to the principal is founded on the existence of such duty in the agent in respect to the condition as will make him, in regard to it, the principal's representative. *Elledge v. National City & Otay Ry. Co.*, 100 Cal. 282, 291, 34 P. 720, 852, 38 Am.St.Rep. 290; *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 538, 123 P. 359, Ann.Cas.1913D, 908; *Baker v. Board of Trustees, etc.*, 133 Cal.App. 243, 248, 23 P.2d 1071. More than that, however, these statements on Mrs. Thomas' part, whatever they may have amounted to, were extrajudicial and having occurred after the accident, were no part of the *res gestae* and were therefore mere hearsay. *Beasley v. San Jose Fruit-Packing Co.*, 92 Cal. 388, 391, 392, 28 P. 485; *Bodholdt v. Garrett*, 122 Cal.App. 566, 10 P.2d 533. They were in no way binding upon appellants and were rightly excluded.

The order granting the new trial is affirmed but only on the ground that the trial court was within its rights in deciding that the evidence was insufficient to justify the verdict.

We concur: JENNINGS, Acting P. J.; MARKS, J

26 Cal.App.2d 444

BAKERSFIELD HOME BLDG. CO. v. J. K.

McALPINE LAND & DEVELOPMENT

CO., Limited.

Civ. 1896.

District Court of Appeal, Fourth District,
California.

May 19, 1938.

Rehearing Denied June 17, 1938.

Hearing Denied by Supreme Court

July 18, 1938.

1. Constitutional law — 171

Since statutes of limitations are primarily concerned with remedies rather than substantive rights, they violate no obligation of contract in either shortening or enlarging the time within which actions may be brought on pre-existing contracts, provided only that when they shorten the time they still leave a reasonable time for commencing such actions, and that when they enlarge the time they do not attempt to revive actions already barred.

2. Statutes — 183

The primary rule of statutory construction to which every other rule as to interpretation of particular terms must yield, is that the intention of the Legislature must be ascertained, if possible, and once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute.

3. Constitutional law — 70(1)

Courts are not at liberty to refuse to apply unambiguous language in a statute which involves no absurdity nor any necessary inconsistency with its general purpose, nor may they indulge in mere speculations to the effect that the Legislature meant something other or less than what it said.

4. Statutes — 189

Courts may not depart from the literal construction of a statute unless they can be reasonably assured that the Legislature meant to say something different from what it appears to have said.

5. Mortgages — 3

The Mortgage Moratorium Acts of 1935 and 1937 evince throughout a purpose not only to protect debtors, but, as incidental to the protection of debtors, to protect creditors as well from suffering unnecessary losses consequent upon the financial depression. St.1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St. 1937, c. 167, p. 461 et seq., § 2 et seq.

6. Mortgages — 3

Under the Mortgage Moratorium Acts, it cannot be assumed that Legislature intended to require debtors to resort to the courts to gain postponement, even where creditors might be willing, for reasonable periods, voluntarily to forbear insisting on their remedies for default. St.1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St. 1937, c. 167, p. 461 et seq., § 2 et seq.

7. Mortgages — 375

An action to recover a deficiency judgment is founded upon the instrument secured by the mortgage, deed of trust or other contract whereby the security is given, although the amount of the deficiency may not be ascertainable until the security has been exhausted, and, therefore, it is not competent until that time to bring an action to recover it.

8. Mortgages — 375

An action to recover a deficiency judgment is "founded upon a written instrument secured by a mortgage, deed of trust," etc., within Mortgage Moratorium Acts extending period within which action may be brought thereon. St.1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St.1937, c. 167, p. 461 et seq., § 2 et seq.

9. Mortgages — 375

Where note which was executed in 1930 was secured by trust deed, trust deed was foreclosed in February, 1937, and in September, 1937, action was brought on note for deficiency judgment, and statute which was enacted in 1933 required such deficiency proceeding to be brought within three months after foreclosure sale, action was brought in time, under Mortgage Moratorium Acts. Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116; § 580a, as enacted by St.1933, p. 1672; St.1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St.1937, c. 167, p. 461 et seq., § 2 et seq.

10. Mortgages — 375

That an action on a note secured by a trust deed, to recover deficiency judgment, was not barred although brought seven months after foreclosure under trust deed, by virtue of Mortgage Moratorium Acts, did not mean that statute requiring deficiency proceeding to be brought within three months of foreclosure was impliedly repealed by Moratorium Act, but the statute

remained in full effect as to instruments executed since February 1, 1935, and was not repealed even as to earlier instruments. Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116; § 580a, as enacted by St.1933, p. 1672; St.1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St.1935, p. 1214, § 20; St. 1937, p. 466, § 20; c. 167, p. 461 et seq., § 2 et seq.

11. Mortgages ⇐375

In action on note for deficiency judgment, where trust deed securing note had been foreclosed seven months prior to bringing action on note, and note was executed prior to enactment of statute requiring deficiency proceeding to be brought within three months of foreclosure sale, plaintiff was not required to comply with requirement of the statute that he allege what was the fair market value of the property by which the note was originally secured. Code Civ.Proc. § 337, subd. 1, as amended by St. 1933, p. 2116; § 580a, as enacted by St. 1933, p. 1672; St. 1935, c. 348, p. 1209 et seq., § 2 et seq., as amended by St.1937, c. 5, p. 57 et seq.; St.1935, p. 1214, § 20; St. 1937, p. 466, § 20; c. 167, p. 461 et seq., § 2 et seq.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Bakersfield Home Building Company, a corporation, against the J. K. McAlpine Land & Development Company, Limited, to recover the balance due on a promissory note which was secured by a trust deed under which defendant had foreclosed. Judgment for defendant, and plaintiff appeals.

Reversed and remanded, with instructions.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

H. E. Schmidt, of Bakersfield, for respondent.

HAINES, Justice pro tem.

The complaint in this action alleges the execution by defendant to plaintiff of a promissory note dated October 28, 1930, for \$2,500 with interest, payable at the rate of \$50 per month, including interest, commencing November 28, 1930, also the coincident execution by defendant to secure the note of a deed of trust affecting certain real property in Kern county to Bank of

America of California, a corporation, as trustee for plaintiff's benefit. It is further alleged that prior to February 9, 1936, no part of said indebtedness had been paid except the interest to August 15, 1932, and \$136.06 to apply on the principal, and that the unpaid principal and accumulated interest amounted as of February 9, 1937, to the aggregate sum of \$3,589.48. The complaint further states that on January 30, 1936, plaintiff caused to be recorded in the office of the county recorder of Kern county a notice of defendant's default and that the said real property was, pursuant to the provisions of said deed of trust, sold by the said trustee on February 9, 1937, for \$1,800, which amount was credited upon the obligation, leaving an unpaid deficiency of \$1,789.48. It is alleged that the note contained a provision for reasonable attorneys' fees in the event of an action brought for its enforcement. Judgment is sought for said unpaid balance, for the interest subsequently accruing, attorneys' fees and costs. The complaint was filed on September 10, 1937. The defendant demurred, alleging a failure to state any cause of action and further setting up that it appears from the face of the complaint that the action was not commenced within the time limited by section 580a of the Code of Civil Procedure. The court having sustained this demurrer without leave to amend, entered judgment for the defendant and from this judgment the present appeal is prosecuted. Section 580a, supra, was originally enacted in 1933, St. 1933, p. 1672, and provides that any action to recover a balance due on an obligation for which a deed of trust or mortgage with power of sale has been given as security, following the exercise of the power of sale, must be brought "within three months of the time of sale under such deed of trust or mortgage." The same limitation was in the same year, St.1933, p. 2116, written into subdivision 1 of section 337 of the Code of Civil Procedure. The present action was brought over seven months after the sale.

[1] It is not disputed that, since statutes of limitations are primarily concerned with remedies rather than substantive rights, they violate no obligation of contract in either shortening or enlarging the time within which actions may be brought for the enforcement of rights under preexisting contracts, provided only that when they shorten the time they still leave a reason-

able time for commencing such actions, and provided that when they enlarge the time they do not attempt to revive actions already barred. *Doehla v. Phillips*, 151 Cal. 488, 492, 91 P. 330; *Swamp Land District v. Glide*, 112 Cal. 85, 44 P. 451; *Reynolds v. Jensen*, 14 Cal.App.2d 558, 58 P.2d 687; *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365. In the instant case appellant relies, as having extended the time previously shortened by said sections 580a and 337, subdivision 1, within which the present action might be brought, on the two moratorium acts of 1937, constituting chapters 5 and 167 of the Statutes of 1937, pages 57, 460, effective respectively on January 29 and May 5 of that year. The first of these, in its section 9, page 60, so amended section 19 of the Moratorium Act of 1935, St.1935, p. 1214, as to make it read:

"Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter 1, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter VII, Statutes of 1935, or any other provision of law, during the period commencing with the effective date of this act and ending on July 1, 1937, such time is hereby extended so as not to expire until the first day of October, 1937."

The second of the moratorium acts of 1937 referred to contained in section 19 thereof the following language:

"Sec. 19. Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter 7 or Chapter 348, Statutes of 1935, or by virtue of the provisions of Chapter 5, Statutes of 1937, or any other provision of law, during the period commencing with the effective date of this act and ending on October 1, 1937, such time

is hereby extended so as not to expire until the first day of July, 1939." St.1937, p. 466.

[2] It is apparent that if construed literally the first of the 1937 moratorium enactments will have operated to extend appellant's time for filing the instant case until October 1, 1937, and the second until July 1, 1939. Counsel for respondent claims that such a construction cannot be indulged for the reason that the above-mentioned provisions of section 580a and of section 337, subdivision 1, of the Code of Civil Procedure were held in *Reynolds v. Jensen*, supra (page 688), to have been designed to "lighten the burdens of trust deed debtors". He urges that the provisions for extending the period of limitation are manifestly designed to be merely complementary to the provisions of the moratorium statutes permitting the debtor to invoke the intervention of the courts to delay the institution of foreclosure proceedings. Mortgage and Trust Deed Moratorium of 1935, St.1935, c. 348, p. 1209 et seq., § 2, et seq., amended by St.1937, c. 5, p. 57 et seq.; Mortgage and Trust Deed Moratorium of 1937, St.1937, c. 167, p. 461 et seq., § 2, et seq. He argues, therefore, that where the debtor has not, in fact, sought judicial intervention for that purpose, there is no reason for extending the creditor's time to take any action that he would, but for such extension, be required to take within the three months next following the trustee's sale of the land, and, therefore, under the rule cessante ratione cessat lex, that the extensions made by the above-quoted provisions of the moratorium statutes should be treated as inapplicable. As supporting this view counsel cites *Lucchesi v. State Board of Equalization*, 137 Cal.App. 478, 482, 31 P.2d 800, 801, in which the court quotes from 23 California Jurisprudence, p. 725, to the effect that "the primary rule of statutory construction to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained, if possible, and once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute".

[3-6] We do not question the correctness of the principles laid down in *Lucchesi v. State Board of Equalization*, supra, and in the passage from California Jurisprudence therein quoted from. Clearly, however, the courts are not at liberty to refuse to apply unambiguous language in a statute

which involves no absurdity nor any necessary inconsistency with its general purpose; nor may they indulge in mere speculations to the effect that the legislature meant something other or less than what it said. They may not depart from the literal construction of the statute unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said. In the instant case we have no reason for coming to any such conclusion. We are in agreement with the position taken for appellant that the moratorium acts evince, throughout, a purpose not to protect debtors only, but, as incidental to the protection of debtors, to protect creditors as well from suffering unnecessary losses consequent upon the financial depression, and this may be reasonably concluded from the recitals in the first section of the "Mortgage and Trust Deed Moratorium of 1935" (St.1935, c. 348, p. 1208), of which the first of the 1937 moratorium enactments above quoted is an amendment, and from those in the corresponding section of the "Mortgage and Trust Deed Moratorium of 1937" (St.1937, c. 167, p. 460), of which the second 1937 enactment mentioned is a part. We think, moreover, that the same purpose must necessarily be deduced from each of these respective acts taken as a whole. Moreover, we cannot assume that the legislature intended to require debtors to resort to the courts to gain postponement, even where creditors might be willing, for reasonable periods, voluntarily to forbear insisting on their remedies for default. Yet such would be the effect if the statutory extensions of the ordinary time for commencing or prosecuting proceedings to collect debts were held inapplicable when the debtor had not, on his part, actually applied to the courts for delay. The fallacy of such a view is pointed out in *Harris v. Fitting*, 9 Cal.2d 117, 69 P.2d 833, as follows (page 835):

"Lastly, appellants urge that, as the Moratorium Law was enacted for the benefit of debtors, not of creditors, it should be applied only in cases where debtors have sought aid thereunder, not in cases such as the present one, where no petition for moratorium relief was filed by the debtor and the creditor was in no way prevented from filing the foreclosure proceeding within the time prescribed by section 337 of the Code of Civil Procedure. From a reading of the act it appears that its intent was to relieve debtors not only in cases where such relief was sought directly, but also in cases where

it was afforded indirectly by the act of the creditor in refraining for an extended period from starting foreclosure proceedings. In either case the granting of this relief to the debtor makes necessary an extension of the statute of limitations for the protection of the creditor, and section 19 properly so provides. The case of *Christina v. McLoughlin* [18 Cal.App.2d 410], 63 P.2d 1174, does not conflict with the views here announced. In that case the court merely held that, inasmuch as there appeared to be no effective period of postponement authorized by the moratorium statute there involved, the time for commencement of the action was not thereby extended."

[7, 8] There is nothing in the suggestion that the extension of time granted by the legislation under discussion to creditors is inapplicable to actions brought to recover balances due after the sale of the land by which the obligation was originally secured, and the application upon the debt of the proceeds. The extension has to do, by the express language of each of the moratorium statutes involved, with actions "founded upon a written instrument secured by mortgage, deed of trust or contract of purchase", etc. An action to recover a deficiency judgment is manifestly "founded" upon the instrument secured by the mortgage, deed of trust, contract of purchase or other contract whereby the security is given, although the amount of the deficiency that the holder is entitled to recover may not be susceptible of ascertainment until the security has been exhausted; and therefore it is not competent until that time to bring an action to recover it. Since, however, such an action is on the instrument secured (though not on the instrument that affords the security) such action is definitely included among those to which the moratorium privilege is expressly extended. The circumstance that the statutory extension has no application to obligations originally unsecured is immaterial.

[9] It is our view, then, that the time for commencing the present action was, before it had expired, extended by the moratorium legislation above discussed, first to October 1, 1937, and then to July 1, 1939, and therefore that the action was brought in time.

[10] It may be added that this conclusion does not mean that section 580a, supra, and the corresponding part of section 337, supra, of the Code of Civil Procedure, or either of them, have been "repealed by im-

plication", or otherwise. The result of section 20 of the said moratorium act of 1935, St.1935, p. 1214, and of section 20 of the said moratorium act of May 5, 1937, St.1937, p. 466, is to leave these code sections in full effect as to instruments executed since February 1, 1935. Nor are the code sections repealed even as to earlier instruments. The time allowed for commencing the actions referred to in them is merely enlarged to the extent stated in the moratorium statutes. The enlargement is effected by the express terms of the latter statutes and not by any implication whatever. The suggestion, therefore, in respondent's behalf, that implied repeals are not favored is entirely irrelevant to the case.

According to its minutes, the trial court in sustaining the demurrer relied on *Palo Alto Mut. B. & L. Ass'n v. Cook*, 17 Cal. App.2d 193, 61 P.2d 499, in which the facts were similar to those in the instant case. *Palo Alto Mut. B. & L., Ass'n v. Cook* did not reach the Supreme Court. There the sale under the deed of trust occurred on September 4, 1934, and the action to recover the deficiency was commenced on April 8, 1936. No question respecting the effect of the 1934 moratorium statute (Statutes of Extra Session of the 50th Legislature, c. 1, approved September 15, 1934, St.1935, p. 1) or of any subsequent moratorium legislation appears to have been raised or discussed there. It is likewise true that no question of the applicability of any moratorium statute was discussed in *Reynolds v. Jensen*, supra. Manifestly, therefore, neither of these cases argue anything against the conclusions which we have reached. *Alferitz v. Borgwardt*, 126 Cal. 201, 202, 207, 58 P. 460. In this case it was held that a decision failing to note the effect of a statute did not amount to a construction of such statute. See, also *Mersfelder v. Spring*, 139 Cal. 593, 595, 73 P. 452.

[11] Since the note sued on was executed prior to the enactment of section 580a of the Code of Civil Procedure it was, of course, unnecessary for appellant to comply with the requirement of that section that he allege in his complaint what was the fair market value of the property by which the note was originally secured. *Bennett v. Superior Court*, 5 Cal.App.2d 13, 42 P.2d 80; *Central Bank of Oakland v. Proctor*, 5 Cal.2d 237, 54 P.2d 718; *Loeb v. Christie Hotel Corp.*, 16 Cal.App.2d 299,

300, 60 P.2d 529; *Everts v. Blaschko*, 17 Cal.App.2d 188, 190, 61 P.2d 776.

The judgment is reversed and the case remanded to the trial court with instructions to overrule the demurrer to the complaint and allow the defendant proper time in which to answer.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 319

DE BRUM'S ESTATE et al. v. SOARES.

Civ. 2217.

District Court of Appeal, Fourth District,
California.

May 11, 1938.

Hearing Denied by Supreme Court

July 8, 1938.

1. Executors and administrators ⇨17(3, 7)

The statute prescribing order of priority of right to letters of administration perpetuates former rule whereby, if surviving spouse was entitled to succeed to some part of the estate, it was mandatory to appoint spouse or spouse's nominee, if competent, in preference to any one else. Probate Code, §§ 422, 423.

2. Executors and administrators ⇨17(7)

The nominee of a decedent's sister is now prima facie entitled, as of right and not as a matter of discretion, to be preferred to decedent's nephew in granting letters of administration, if sister succeeds to any part of decedent's estate, even though nephew and not such nominee is entitled to share in some part of the estate. Probate Code, §§ 401, 420, 422, 423, 442.

3. Executors and administrators ⇨17(1)

Under statute authorizing contest of petition for letters of administration on ground of incompetency "or for other cause," court may refuse appointment to an applicant prima facie entitled to appointment if applicant is incompetent, or, in the exercise of a sound discretion, for other reasons than incompetency. Probate Code, §§ 401, 420, 442.

4. Executors and administrators ⇨20(7)

Evidence indicating that decedent's sister had interests adverse to the estate and

had spent some of decedent's money, apparently to care for decedent, *held* not to establish disqualification of sister's nominee so cogently as to render it an abuse of discretion to grant letters of administration to such nominee rather than to decedent's nephew. Probate Code, §§ 401, 420, 422, 423, 442.

5. Executors and administrators ⇨20(7)

A nephew of decedent seeking to be granted letters of administration in preference to nominee of decedent's sister had burden of establishing that nominee was under some disqualification warranting court in overriding nominee's otherwise *prima facie* right to letters. Probate Code, §§ 401, 420, 442.

6. Executors and administrators ⇨17(7)

That cotenancy in land existed between decedent and husband of decedent's sister, and that sister subsequently acquired husband's interest, did not establish existence of partnership between sister and decedent, such as would disqualify sister's nominee for appointment as administratrix. Probate Code, §§ 401, 420, 442.

7. Executors and administrators ⇨17(7)

The court has discretionary power to refuse letters of administration to nominee of decedent's sister where nominee's interests are so adverse to estate's interests that granting letters would prejudice rights of estate, even though nominee is competent and is otherwise entitled to letters. Probate Code, §§ 401, 420, 442.

8. Executors and administrators ⇨17(7)

A daughter of decedent's sister, nominated by sister to act as administratrix, must be treated as standing in the same position as sister in determining whether interest adverse to interests of the estate, which would disqualify daughter from acting as administratrix, exists. Probate Code, §§ 401, 420, 442.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Proceedings in the matter of the estate of Joe S. DeBrum, deceased, wherein Felix Simas and Mary Soares each filed petitions for letters of administration. From an order granting the petition of Mary Soares and denying the petition of Felix Simas, Felix Simas appeals.

Affirmed.

John T. De Freitas and J. C. C. Russell, both of Hanford, for appellant.

Thomas F. Lopez, of Fresno, and Sidney J. W. Sharp, of Hanford, for respondent.

HAINES, Justice pro tem.

Joe S. DeBrum died a resident of Kings county on July 18, 1936, intestate and leaving estate therein. He had never been married and left no issue nor parents surviving, his heirs at law being five sisters, one of whom is Carolina V. Cardoza, and sundry nephews and nieces whose parents, as we gather from the findings, must be deceased. Appellant Felix Simas is one of these nephews. Appellant Simas and respondent Mary Soares, who is a daughter of the said Carolina V. Cardoza, each filed a petition for letters of administration upon the decedent's estate, Mary Soares being the nominee of her mother, Mrs. Cardoza, and, upon the two petitions coming on to be heard together, as contemplated by section 442, Probate Code, the court granted the petition of respondent Mrs. Soares for letters and denied the petition of appellant. From this order the present appeal is prosecuted.

[1] In the order of priority in the right to letters of administration upon an intestate's estate laid down by section 422, Probate Code, brothers and sisters entitled to succeed to all or some part of the estate are placed in the fifth class, and others described as "next of kin entitled to share in the estate" in the sixth class. Formerly, by the express provision of subdivision 1 of section 1365, Code of Civil Procedure, it was mandatory on the court when a surviving spouse was entitled to succeed to some part of the estate to appoint him or her or his or her nominee, if competent, in preference to anyone else. Estate of Dorris, 93 Cal. 611, 29 P. 244; Estate of Richardson, 120 Cal. 344, 52 P. 832; Estate of Dow, 132 Cal. 309, 64 P. 402; Regents v. Turner, 159 Cal. 541, 114 P. 842, Ann.Cas.1912C, 1162; Estate of Martin, 163 Cal. 440, 125 P. 1055. That situation is perpetuated by subdivision 1 of the present section 422, Probate Code. Contrariwise, however, it was held that the provision of former section 1379, Code of Civil Procedure, to the effect that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the

written request of the person entitled, filed in court," was, except as to nominees of the surviving spouse, permissive only, and that the court had the discretionary right, instead of acting upon it, to appoint applicants of classes subsequent in priority to the one making the nomination. *Estate of Myers*, 9 Cal.App. 694, 100 P. 712; *Estate of Meier*, 165 Cal. 456, 461, 132 P. 764, 48 L.R.A.,N.S., 858, Ann.Cas.1914D, 121. It is, however, now provided by section 423, Probate Code, that:

"Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in court. If the person making the request is a child, parent, brother or sister of the decedent, the nominee shall have priority next after those in the class of the person making the request; otherwise the court, in its discretion, may appoint either such nominee or a person of a class subsequent in rank to that of the person making the request; but other persons of the class of the person making the request shall have priority over such nominee."

[2] It is said in *Estate of Somerville*, 12 Cal.App.2d 430, 432, 55 P.2d 597, 598, that: "the section plainly gives priority to a competent nominee of a child, parent, brother, or sister of a decedent over persons in subsequent classes; and it is only as to the latter classes that the court may in its discretion appoint either a nominee or a person of a class subsequent in rank to that of the person making the request."

In 11A California Jurisprudence, pp. 335, 336, the subject is discussed in the following language:

"This section of the Probate Code is largely new legislation in the construction of which the older decisions leave some questions open and debatable, and it is necessary to construe the present statute in the light of the conditions which preceded it. The opening words, 'administration may be granted', in section 423 signify an element of discretion limited by what follows. As appears from the succeeding words of that section nominees of a 'child, parent, brother, or sister' have a priority which does not see to be subject to the discretion given to the court over nominations by other 'persons entitled'. A fair construction of the present statute seems to be that appointment of a competent nominee of a child, parent, brother or

sister (if in rank next after the nominator's class) is imperative; that it is discretionary to appoint either the nominee or one of any class lower than the nominator's, if the nomination be by any person in the sixth and lower classes; in any case it is imperative to prefer other members of the same class to the nominee of a class member. But all this is for the courts to decide."

[3] Without intending at this time to go farther in the construction of the present statute, section 423, Probate Code, with respect to the suggestions in the language from California Jurisprudence just quoted than the court went in *Estate of Somerville*, supra, or farther than is strictly required for the decision of the present case, we here express our accord with the view expressed in the *Somerville* Case that, prima facie, the nominee of a sister of a decedent, if the sister succeeds to any part of the decedent's estate, is now entitled, as of right and not as a matter of the court's discretion, to be preferred to a nephew, even though the nominee have no right to any part of the estate while the nephew is entitled to share in it or some part of it. This is prima facie the situation. Of course, the nomination may be rejected if the nominee is incompetent. That follows from the language of section 442, Probate Code, as it was held to follow from the former section 1374, Code of Civil Procedure. Under this section of the Code of Civil Procedure, however, it was held that incompetency was the only ground for rejecting the application of one otherwise entitled to letters and the grounds for declaring an applicant incompetent were held to be those only which were specified in the former sections 1350 and 1369 of that Code, corresponding to the present sections 401 and 420, Probate Code (*Estate of Bauquier*, 88 Cal. 302, 26 P. 178, 532; *Estate of Muersing*, 103 Cal. 585, 37 P. 520; *Estate of Carmody*, 88 Cal. 616, 26 P. 373; *Estate of Brundage*, 141 Cal. 538, 540, 75 P. 175; *Estate of Randall*, 177 Cal. 363, 366, 170 P. 835), whereas it is now held that the inclusion in section 442, Probate Code, of the words "or for other cause" gives the court the right, in the exercise of a sound discretion, to refuse an appointment to an applicant generally entitled, though such refusal be for other reasons than incompetency. *Estate of St. John*, 8 Cal.2d 175, 64 P.2d 725. In the case

last cited the refusal was based on the circumstance that the person who had nominated the applicant made claims adverse to the estate with respect to certain property and was prosecuting an action to enforce the same.

[4,5] From what we have said it results, in the instant case, that respondent Mary Soares appeared to be *prima facie* entitled, as of right and not merely as a matter of the court's discretion, to be preferred to appellant in the grant of letters. To overcome such showing it was incumbent upon appellant to establish that respondent was under some disqualification sufficient in its nature and extent to warrant the court in overriding what, but for the disqualification, would be her right to letters. Appellant in his formal objection to her appointment asserts that she is incompetent "by reason of her improvidence, want of understanding, and want of integrity". The evidence does not show that she has been or is either improvident or deficient in understanding or wanting in general integrity, and the only arguable ground for claiming that letters should have been denied her, although that is not pleaded in terms in the objections filed, is that her mother, Mrs. Cardoza, by whom she was nominated, is possessed of interests adverse to the estate.

Appellant's claim concerning Mrs. Cardoza's alleged adverse interests is based in part on the testimony of one Rose Finch and in part on his own testimony. Rose Finch had formerly been married to a brother, since deceased, of the said Joe S. DeBrum. She testified to the effect that after this brother's death she, as his widow, took charge of Joe S. DeBrum's affairs and, in doing so, came into possession of about \$6,700 worth of personal property, part in cash and part in notes, all belonging to the said Joe S. DeBrum. She further testified that she turned over all this property not to the said Carolina V. Cardoza but, at the written request of the said Joe S. DeBrum, to Mrs. Cardoza's then husband, a Mr. Cardoza, and that the assets so turned over to Mr. Cardoza included a note referred to as amounting to \$224.75 signed by appellant Simas which, so far as she, Mrs. Finch, knows, has never yet been paid. In addition to what was said by Mrs. Finch, it appears from appellant's testimony that some years ago Mr. Cardoza (since de-

ceased but at that time, as stated, the husband of respondent's nominor) and the decedent Joe S. DeBrum, together bought 20 acres of land, each taking a half interest therein. There is nothing in the record to indicate that Mr. Cardoza did not pay his full half of the purchase price and there is testimony in the record that he did. Appellant was allowed to go on and testify that Mrs. Cardoza had, about a year ago, told him that after this purchase Joe S. DeBrum had left five or six thousand dollars in the bank. With respect to this, appellant's testimony includes the following:

"Q. Now, you say Mrs. Cardoza told you the money was in the bank for Brum after the land was bought? A. He had it but he had spent it. He told me—my aunt told me he had about between four and five thousand dollars in the bank after he bought that place and paid for it, my uncle's money.

"Q. The First National Bank—A. He had it on the First National Bank and I think a thousand dollars in the Lemoore Bank and some on the Cardoza Bank over at Riverdale.

"The Court: I didn't get the amounts, there. A. This money is divided, I believe, in the First National at Lemoore, and some in the First National of Hanford, and some money, between fourteen hundred dollars, over at Frank Brown's at Riverdale.

"The Court: Altogether it would be how much? A. Between four and five thousand dollars.

"Q. She told you that about a year ago? A. Yes, just about a year ago. But he had spent it.

"Q. Just a minute now. That he had spent it. A. He told me he had spent it, himself.

"Q. Who told you? A. Mrs. Cardoza. Mr. Russell: When he says, 'He', he means 'she'."

At an earlier point in his testimony appellant had described Mrs. Cardoza as speaking in her conversation with him about the money as follows:

"Q. Yes, what did she tell you? A. Told me, bought the place together, this 20 acres, and used some of this money to run the place together, and the uncle the time he went out looking for Frank Brown, he came back to Riverdale and he left between eight and nine hundred

dollars, I don't know exactly, then kept going back making his living. Asked him, 'You know that's bad thing to do?' He says, 'Well, we spent the money. We ain't got it. If anybody ask me, I say we spent it.' * * *

"Q. Mrs. Cardoza told you that? A. Yes, sir."

It is apparent that, in trying to quote Mrs. Cardoza, appellant, who spoke through an interpreter, at times at least, used the word "he" where he meant "she".

From appellant's testimony it would seem that after the land purchase above referred to the deceased Joe S. DeBrum had lived for something like a year with the Cardozas. The admission which appellant attributed to Mrs. Cardoza about the spending of decedent's money may have been taken by the trial court to amount to no more than a statement that while the deceased and the Cardozas were living together whatever money the deceased may have had left after paying his part of the purchase price of the land was, with his concurrence and consent, spent in running the place.

It appears from the evidence that at a later time the deceased lived for five of six years with his nephew, the appellant, and died while still residing with him. Some time before his death he deeded his half interest in the above-mentioned 20 acres to appellant in consideration, according to the latter, of appellant's agreement to maintain him for the rest of his life. It further appears that a short time before decedent's death appellant, through one of his attorneys, collected \$250 on an account due decedent and that after satisfying therefrom the attorney's charges he devoted the rest to buying a bed, taking care of some grocery bills of the deceased and employing for him a nurse.

In respondent's petition for letters she describes the decedent's estate as consisting of an undivided half of the 20 acres referred to and \$250 in cash. Her manifest intention was to set out as belonging to the estate the half interest in the 20 acres that appellant now claims as having been deeded to him by his uncle, plus the \$250 just mentioned as collected by appellant on his uncle's account and disbursed. Respondent makes no mention of any of the money or assets of the deceased said to have been turned over by Mrs. Finch

to the late Mr. Cardoza, her nominor's husband.

It is claimed on appellant's part that respondent's conduct displays a studied effort on behalf of her mother, Mrs. Cardoza, to suppress an indebtedness from the latter to the deceased and, therefore, that respondent's application for letters should have been refused. Not only does it appear to us that any evidence that Mrs. Cardoza herself ever had any possession of any of the decedent's money or other property is exceedingly tenuous, but had the court granted letters to appellant, respondent might with about the same degree of plausibility that now attends appellant's objections have made some such claim as may have been indicated by her petition that appellant is not entitled to retain the interest in the 20 acres acquired by him through the deed from his uncle, or that he ought to turn over to the estate the \$250 above referred to, and that, by reason of these circumstances he is not entitled to the appointment.

[6] Appellant further suggests that there has been a copartnership between respondent's mother and the decedent which should be treated as disqualifying respondent for appointment. This claim is based merely on the circumstance that there once existed a cotenancy in the 20 acres referred to between decedent and Mr. Cardoza and that Mr. Cardoza's former interest now belongs to respondent's mother. Manifestly, no partnership of any sort was shown.

[7,8] Viewing the situation as a whole and conceding that the court had the discretionary power to refuse to grant letters to respondent, even though otherwise entitled to them and a competent person, had it believed her interests so adverse to those of the estate that such action would prejudice its rights, and conceding further that respondent, so far as any adverse interest is concerned, must be treated as standing in the same position as her mother and nominor (*Estate of Connick*, 189 Cal. 498, 209 P. 356) we are yet unable to see that appellant's showing was so cogent as to indicate on the part of the trial court any abuse of discretion.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

MYERS v. TRANQUILITY IRR. DIST.

Civ. 1877.

District Court of Appeal, Fourth District,
California.

May 17, 1938.

Hearing Denied by Supreme Court
July 15, 1938.**Master and servant** ⇨300

An unemancipated minor cannot recover damages from his father's employer for injuries caused by father's negligence.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Robert Myers, a minor, by and through Elizabeth Myers, his guardian ad litem, against the Tranquility Irrigation District for injuries suffered in an automobile accident. From a judgment on a verdict for plaintiff and an order denying a motion for judgment notwithstanding the verdict, defendant appeals.

Reversed, with directions.

Ray W. Hays and William M. Miles, both of Fresno, for appellant.

Louis J. Coelho and Hayhurst & Gibson, all of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff for damages resulting from injuries suffered in an automobile accident and from an order denying a motion for judgment notwithstanding the verdict.

Plaintiff, the minor child of Frank Myers and Elizabeth Myers, recovered judgment against defendant for injuries suffered in an automobile accident which happened on July 20, 1935, in the town of Tranquility in Fresno county. The automobile that injured plaintiff was owned by defendant and was being driven by Frank Myers, the father of plaintiff.

The sole question necessary for our consideration may be stated thus: Can an unemancipated minor recover damages against the employer of his father for injuries caused by the negligence of his father? The question is one of first impression in California.

For the purpose of this opinion we will assume the following facts: That at the time and place of the accident Frank Myers,

as an employee of defendant, was driving an automobile of defendant on his employer's business and was acting within the scope of his authority; that he was negligent in the operation of the automobile; that such negligence was the sole and proximate cause of plaintiff's injuries; that plaintiff was not guilty of contributory negligence.

There is a flat and irreconcilable conflict of opinion among the courts of the various states of the Union on the question before us. As the decisions are numerous we will not attempt to review them in detail but will content ourselves with the citation of some of them.

The line of cases relied upon by plaintiff for support of the judgment may be divided into three general classes as follows:

First: A wife may recover judgment against the employer of her husband for damages resulting from injuries caused by the negligence of her husband while on his employer's business and acting within the scope of his authority. See *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293; *Le Sage v. Le Sage*, 224 Wis. 57, 271 N.W. 369; *Poulin v. Graham*, 102 Vt. 307, 147 A. 698; *Metropolitan Life Ins. Co. v. Huff*, 48 Ohio App. 412, 194 N.E. 429; *McLaurin v. McLaurin Furniture Co.*, 166 Miss. 180, 146 So. 877; *Koontz v. Messer*, 320 Pa. 487, 181 A. 792.

Second: An unemancipated minor may sue his parent for damages resulting from injuries caused by the negligence of the parent. See *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055; *Smith v. Smith*, 116 W.Va. 230, 179 S.E. 812; *Briggs v. City of Philadelphia*, 316 Pa. 48, 173 A. 316; *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538.

Third: An unemancipated minor may recover judgment against the employer of his parent for damages resulting from injuries caused by the negligence of the parent while on his employer's business and acting within the scope of his authority. See *Le Sage v. Le Sage*, supra; *Chase v. New Haven, etc., Corp.*, 111 Conn. 377, 150 A. 107, 68 A.L.R. 1497.

Among the cases holding that a wife may not sue the employer of her husband for damages caused by his negligence while on his employer's business and acting within the scope of his authority, we cite the following: *Emerson v. Western Seed & Irr. Co.*, 116 Neb. 180, 216 N.W. 297, 56 A.L.R.

327; *Riser v. Riser*, 240 Mich. 402, 215 N. W. 290; *Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N.W. 20, 37 A.L.R. 161; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27.

We cite the following cases holding that an unemancipated minor cannot sue his parent for damages resulting from injuries caused by an act of negligence of the parent: *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7; *Roller v. Roller*, 37 Wash. 242, 79 P. 788, 68 L.R.A. 893, 107 Am.St.Rep. 805, 3 Ann. Cas. 1; *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551; *Ciani v. Ciani*, 127 Misc. 304, 215 N.Y.S. 767; *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198, 42 A.L.R. 1360; *Belleson v. Skilbeck*, 185 Minn. 537, 242 N. W. 1; *Mesite v. Kirchenstein*, 109 Conn. 77, 145 A. 753; *Bulloch v. Bulloch*, 45 Ga.App. 1, 163 S.E. 708; *Elias v. Collins*, 237 Mich. 175, 211 N.W. 88, 52 A.L.R. 1118; *Lund v. Olson*, 183 Minn. 515, 237 N.W. 188; *Reingold v. Reingold*, 115 N.J.L. 532, 181 A. 153; *Canen v. Kraft*, 41 Ohio App. 120, 180 N.E. 277; *Kelly v. Kelly*, 158 S.C. 517, 155 S.E. 888; *Norfolk So. R. Co. v. Greta-kis*, 162 Va. 597, 174 S.E. 841; *Securo v. Securo*, 110 W.Va. 1, 156 S.E. 750; *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787, 52 A.L.R. 1113; *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991, 102 Am. St.Rep. 787, 1 Ann.Cas. 130.

MaHaffey v. MaHaffey, 15 Tenn.App. 570, holds that an unemancipated minor cannot sue a partnership of which his father is a member for damages for injuries caused by the negligence of the father while on the partnership business. A holding of like effect is found in *Belleson v. Skilbeck*, supra.

A further compilation of authorities may be found in notes, 37 A.L.R. 165, 56 A.L.R. 331, and 64 A.L.R. 296. See, also, 43 Harvard Law Review 1079.

Plaintiff urges that those authorities holding that a wife may sue the employer of her husband for damages resulting from injuries caused by the negligence of her husband while on his employer's business and acting within the scope of his authority present a strong analogy to the case before us and that their reasoning and conclusion should be followed here. With this we cannot agree. California is a community property state. Such a judgment obtained by the wife would be community property. Section 164, Civ. Code. Both the husband and the wife have an equal interest in the

community property during the continuance of the marriage relation, section 161a, Civ. Code, and the husband has the management of the community personal property, section 172, Civ.Code. See, also, *McFadden v. Santa Ana, etc., Ry. Co.*, 87 Cal. 464, 25 P. 681, 11 L.R.A. 252; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 P. 954; *Gomez v. Scanlan*, 155 Cal. 528, 102 P. 12. A husband cannot by his own negligence enrich the community funds of which he is both the manager and part owner and thus profit by his own wrong. *Basler v. Sacramento Gas & Electric Co.*, 158 Cal. 514, 111 P. 530, Ann.Cas. 1912A, 642; *Moody v. Southern Pacific Co.*, 167 Cal. 786, 141 P. 388; *Havens v. Loebel*, 103 Cal.App. 294, 284 P. 717; *Rapolla v. Goulart*, 105 Cal.App. 417, 287 P. 562; *Solko v. Jones*, 117 Cal.App. 372, 3 P.2d 1028; *Martin v. Costa*, 140 Cal.App. 494, 35 P.2d 362.

We find California adhering to the majority rule that an unemancipated minor cannot sue his parent for damages resulting from the tort of the latter. The reasons for following the majority rule are thus stated in *Trudell v. Leatherby*, supra (page 8):

"That a minor child, unemancipated by its parents, cannot sustain an action against its parents seems to be well settled by the authorities. 'Actions by children against their parents are not to be encouraged, unless to redress clear and palpable injustice, and a minor child has no right of action against a parent for the tort of the latter.' 29 Cyc. 1663. See, also, 46 C.J., p. 1324. To the same effect are the following well-considered cases: *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128; *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135; * * * *Mannion v. Mannion*, 129 A. 431, 3 N.J.Misc. 68; *Damiano v. Damiano*, 143 A. 3, 6 N.J.Misc. 849; *Mesite v. Kirchenstein et al.*, 109 Conn. 77, 145 A. 753; *Zutter v. O'Connell*, 200 Wis. 601, 229 N.W. 74.

"The reason of the rule which deprives a minor child of a right of action against the parent for the tort of the latter is that proceedings of that nature tend to bring discord into the family and disrupt the peace and harmony of the household.

"It is well established that a minor child cannot sue his parent for a tort. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor

child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.' 20 R.C.L. 631.

"Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law, and not to be sanctioned by the courts. Such conflict would arise by recognizing the right of a minor child to bring his personal action against the father to recover damages for torts alleged to have been committed by the father in the course of the family relation, and resulting in personal injury to the child.' *Matarese v. Matarese*, supra."

It is the law in California that an employer, against whom a judgment has been rendered for damages occasioned by the unauthorized act of negligence of his employee, may recoup his loss in an action against the negligent servant. *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am. St.Rep.171. If a child cannot sue his parent for injuries caused by the tort of the latter for the reason that such an action would bring discord into the family, certainly the same reasoning would apply to the minor's action against the employer of the parent where the employer is permitted to recover from the parent the amount of the child's judgment against it. The action of the child against the employer may finally result in a judgment against the parent. As the child cannot sue the parent he should not be permitted to institute an action that would finally result in a judgment against the parent. What the child cannot do directly he should not be permitted to accomplish by indirection. It is not only the action of the child against the father but the final judgment that tends "to bring discord into the family and disorganize its government." There is just as strong an interdiction against the judgment as against the suit. Therefore, any suit that would finally result in a judgment against the parent should be prohibited for the same reasons that the direct suit of the child against the parent is prohibited. The final result may be the same in both cases,—a judgment against the parent.

The judgment and order are reversed, with directions to the trial court to grant the motion for judgment notwithstanding the verdict and enter judgment for defendant.

We concur: BARNARD, P. J; JENNINGS, J.

VALLADAO et al. v. FIREMAN'S FUND INDEMNITY CO.*

KATSULAKIS et al. v. SAME.

Civ. 5882.

District Court of Appeal, Third District,
California.

May 17, 1938.

Hearing Granted by Supreme Court
July 15, 1938.

1. Insurance ⇨668(4)

Whether co-operation clause in automobile liability policy has been materially violated so as to prejudice insurer's rights is ordinarily a question of fact for the jury, but may be a question of law for the court.

2. Insurance ⇨514½

In action on automobile liability policy, breach of clause requiring co-operation of assured must be shown to have been material and subsequently prejudicial to insurer's rights in order to be available as a defense.

3. Insurance ⇨668(4)

Whether automobile liability insurer was prejudiced by assureds' misstatements to insurer concerning circumstances of accident and plea of guilty of reckless driving, as constituting breach of co-operation clause in policy, was for jury under evidence that insurer discovered actual facts in time for trial, that the only seriously controverted issue was amount of liability, and that case was tried by stipulation without reference to driver's plea of guilty or to subject matter of misstatements. St.1919, p. 776.

4. Contracts ⇨318

Forfeitures are not favored in either law or equity and will not be enforced unless the right thereto is clear and certain.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Actions brought jointly by Julia Valladao and another, and by Mary J. Katsulakis and another, against the Fireman's Fund Indemnity Company, to recover under automobile liability policies after judgments obtained against defendant's assureds had become final and executions were returned unsatisfied. From a judgment for defendant notwithstanding verdict for plaintiffs, and an order denying motion for new trial, plaintiffs appeal.

Reversed.

Appelbaum & Mitchell, of Oakland, Marvin C. Lernhart, of Napa, and Lewis H. Cromwell, of Petaluma (Lewis N. Mitchell, of Oakland, of counsel), for appellants.

Bronson, Bronson & McKinnon and John H. Painter, all of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These actions were jointly brought by the plaintiffs against the Fireman's Fund Indemnity Company, a corporation, pursuant to the provisions of the Statutes of 1919, c. 367, p. 776, being an action after judgments obtained by the plaintiffs against the assureds of the indemnity company had become final and executions returned unsatisfied.

In November, 1935, plaintiff Julia Valladao and John C. Valladao recovered a judgment in the sum of \$7,500 against Edwin J. Davis and Dave McClure, Jr., and on the same day plaintiffs Mary J. Katsulakis and John P. Katsulakis recovered a judgment against these same defendants in the sum of \$1,000, which judgments were based upon personal injuries received by Julia Valladao and Mary Katsulakis in September, 1934.

At the time of the accident there was in full force and effect a policy of insurance in the Fireman's Fund Indemnity Company, insuring Dave McClure, Jr., against liability imposed by law upon him for bodily injuries. It also extended coverage to any person legally operating the automobile covered by the policy.

The jury returned their verdict in the present action in favor of the plaintiffs, and thereafter, notwithstanding the verdict, the trial court entered judgment in favor of defendant Fireman's Fund Indemnity Company. Thereafter a motion for a new trial on behalf of the plaintiffs was denied. This appeal is from such order and judgment.

There is little dispute as to the facts, which substantially are that defendant indemnity company issued its combination automobile liability and property damage policy to Dave McClure, Jr., which was in full force and effect and covered the truck being driven at the time of the accident. An omnibus clause also covered "any other person or persons while * * * legally operating any such automobile * * * if such * * * operation is with the permission of the named assured * * *".

The accident happened on the highway north of Santa Rosa, about 10 o'clock on the night of September 24, 1934. McClure was driving his truck at the time, accompanied by one Bert Herbert and Edwin J. Davis. As McClure was proceeding along the highway he struck the rear of a car parked on the highway, in which car plaintiffs were seated. When the crash occurred McClure fled the scene of the accident without disclosing his identity to any one connected with the injured parties.

When a traffic officer arrived after the accident, McClure was still absent and Davis told the officer and those at the scene that he, Edwin J. Davis, was the driver. Davis had no operator's license in his own name with him at that time, but had in his possession an operator's license belonging to his brother, John K. Davis. He concealed the fact that McClure had been on the truck and stated to the officer that his name was John K. Davis, whose operator's license he had. The officer then issued a citation for reckless driving in the name of John K. Davis and handed it to Edwin J. Davis. Davis accepted the citation, and in response thereto appeared in the justice's court, and at that time, still posing as John K. Davis, pleaded not guilty to the charge of reckless driving. The first knowledge that the indemnity company had of the accident was received on the forenoon of the day after it occurred, when McClure and Edwin J. Davis reported the accident to defendant's agent in Petaluma. At that time McClure and Edwin J. Davis appeared at the agent's office, and in McClure's presence Edwin J. Davis represented himself as John K. Davis, and told the agent that he was driving McClure's truck at the time of the accident. In answer to questions by the agent, Davis narrated the accident as though he were the driver and told the agent he had borrowed McClure's truck, and that McClure was not in the truck at the time, and that he and Herbert were the sole occupants of the truck, and that he had been arrested for reckless driving. Upon this statement of fact the agent prepared a written report and sent it to the indemnity company. A day or two following this report an adjuster for the defendant interviewed McClure and Edwin J. Davis, when they again confirmed the false statements made at the time of the first report. Some days after these reports were made McClure and Davis again went to the justice's court, at which time Edwin J. Davis, answering to the name of

John K. Davis, entered a plea of guilty to the charge of reckless driving under the name of John K. Davis, and paid a fine therefor.

On November 17, 1934, plaintiffs herein, suing separately, filed actions against McClure and John K. Davis; McClure was sued as the owner and John K. Davis was sued as the operator of the truck. The summons in the cases were sent by the defendants to the indemnity company.

In December, 1934, the indemnity company turned these cases over to its attorneys in Santa Rosa for the purpose of defending McClure and Davis. Early in January, McClure and Davis discussed the facts of the case with these attorneys, and they there repeated substantially the same story they had theretofore told. On the same day, one of these attorneys, with Davis and McClure, visited the scene of the accident and went over the facts in the case, and the same falsifications and concealments were again narrated without correction.

In due time answers to the complaints were prepared on behalf of McClure and John K. Davis, read, and by them duly verified and then filed. These answers affirmatively admitted that McClure's truck was being driven by John K. Davis, but denied negligence upon the part of the operator, and set up contributory negligence as a defense. Again, a month or two later, McClure and Edwin J. Davis called at the office of the attorneys representing them for the purpose of discussing their depositions, which were to be taken by the plaintiffs. At that time they again discussed the facts in detail and again made the same misstatements.

On March 2d, the day before the depositions of McClure and Davis were to be taken, they, accompanied by their personal attorney, Mr. Carpenter, called upon Mr. Murphy, a member of the firm of attorneys who had been retained by the indemnity company to represent them, and then and there informed Mr. Murphy the stories which they had theretofore told were false,—that McClure was driving the truck at the time of the accident, and that Davis was merely a passenger in the truck, and not the driver. At that time McClure also informed Murphy for the first time that he had run away from the scene of the accident and had concealed himself. He said he had done so for the reason that he had been in trouble prior to that time aris-

ing out of a charge of driving while intoxicated, and that he was afraid his driver's license would be revoked.

Immediately following this disclosure Murphy communicated with the San Francisco office of the indemnity company, and then informed McClure and Davis that the indemnity company was withdrawing from their defense, and that Murphy himself and his firm were withdrawing as their attorneys. Murphy also immediately advised the attorney for plaintiffs that his firm was withdrawing as attorneys for McClure and Davis, and that no depositions could be taken at the time set. Later other attorneys were substituted as attorneys for McClure and Davis.

An amended answer setting up the true facts was filed, and it was stipulated at the trial that Davis' name was "Edwin J." rather than "John K." At this trial, held November 10, 1935, judgments were entered in favor of plaintiffs and against McClure and Davis.

In March, 1936, the present action was filed. To this the indemnity company set up as an affirmative defense a breach by McClure and Davis of the cooperation clause in the policy of insurance. After a verdict for plaintiffs, the trial judge granted defendant's motion for a judgment notwithstanding the verdict. It is from that order this appeal is taken.

The cooperation clause contained in the policy issued by the indemnity company to McClure, and about which the issues here raised revolve, reads as follows:

"Co-operation of Assured:—E. The assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the assured's own cost. The assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever, requested by the Company, and at the Company's expense, the assured shall aid in securing information and evidence and the attendance of witnesses, and shall co-operate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal."

The able judge, writing an opinion giving his reasons for setting aside the verdict of the jury, said:

[1-3] "Ordinarily the question of whether a co-operation clause in such a policy

has been violated is a question of fact for the jury. Before such a breach may be held to have occurred it must be shown to have been of a material nature and subsequently prejudicial to the rights of the insurer. There are cases, however, where the question is one of law for the court and which should not be submitted to a jury." We are in accord with this statement of the law. We differ, however, as to its application in the present case.

The trial judge relied largely upon two California Cases, *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, and *Purefoy v. Pacific Automobile Indem. Exch.*, 5 Cal.2d 81, 53 P.2d 155. We, however, after considerable study, have concluded these cases rather support the contention of plaintiffs here.

In *Hynding v. Home Acc. Ins. Co.*, supra, the action was against an insurance carrier to recover the amount of a judgment previously obtained against the assured. In the answer of the company to the complaint the company set up that their insured had failed to cooperate with the company in obtaining information and witnesses, and had failed to attend the trial and testify. The policy of insurance sued upon contained the usual stipulations requiring the insured to report accidents and to cooperate with the company in securing evidence, and in effecting settlements and in prosecuting appeals. The court said (page 1002): "We are also of the opinion, and we think most of the authorities are agreed, that the provision must be one reasonably necessary for the protection of the insurance company, and one which can readily be complied with by the assured; and that the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby. * * * To require the co-operation of the assured to the extent of attendance at the trial, when he is a material and important witness, is a perfectly reasonable condition. Failure to testify may be as damaging as failure to give notice of the accident or of the suit. There is, of course, no obligation on his part to testify favorably to the company's interests, but here his report of the accident indicated that a defense existed, and it would normally be expected that his testimony would bear this out. Under these circumstances the company was clearly prejudiced by his failure to appear. In any

event, the question of such prejudice should have been considered below." The defendant had in the case just mentioned set up as a defense in its answer that the insured had failed to cooperate. At the trial plaintiff moved to strike from the answer this defense, which was granted.

In *Purefoy v. Pacific Automobile Indem. Exch.*, supra, plaintiff recovered a judgment against W. S. Austin and Jack Austin, his minor son, for personal injuries sustained by plaintiff as a result of the negligent operation by the son of the automobile owned by the father. Thereafter plaintiff commenced an action to recover the amount of the judgment against Pacific Automobile Indemnity Exchange, the insurance carrier. The trial court rendered judgment for defendant, holding that Austin had violated conditions of the policy requiring the insured to give immediate notice of the accident. The fact was that the insurer first learned of the accident some three and one-half months after the accident, when it received a letter from the attorney for the injured party, asking for the address of the insured. The company immediately tried to communicate with their client and sent letters to him at the address given in the policy, and elsewhere, but were unable to locate him until he was served with summons some year and three months after the accident.

Affirming the judgment of the trial court, the Supreme Court held that Austin had failed to give immediate notice of the accident as required in his policy, and upon the facts found prejudice to the injured party sufficient to justify the trial court finding in favor of the indemnity exchange. In regard to the necessity of showing prejudice in the matter of noncooperation, the court said (page 158):

"Respondent contends that as liability insurance is not compulsory, but voluntary, effect must be given to express conditions between the parties to the contract of insurance, as in the case of other types of contracts, without a showing of prejudice.

"We are not disposed at this time to enter upon a further consideration of the conflicting decisions as to whether prejudice must be shown, for we are of the view in the instant case, as we were in the *Hynding Case*, supra, that prejudice sufficiently appeared, and the court below so found."

In *Panhans v. Associated Indemnity Corp.*, 8 Cal.App.2d 532, 47 P.2d 791, 795, Panhans had been injured by an automobile

belonging to one King, who was insured by a policy of public liability insurance issued by the Associated Indemnity Company and he (Panhans) recovered a judgment against the indemnity company. The main defense urged by the indemnity company at the trial was the alleged breach by King of the cooperation clause in the insurance policy. One of the grounds urged on appeal was that the trial court erred in instructing the jury to the effect that in order to relieve itself of responsibility under the policy, the insured must show that the breach, if any there was, affected the material condition of the policy and that the breach operated to the substantial prejudice of the insurance carrier. There the reviewing court had before it and considered the cases of *Hynding v. Home Accident Insurance Co.*, supra, and *Purefoy v. Pacific Auto. Indem. Exch.*, supra, and said (page 792):

"And there are two recent cases (*Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, and *Purefoy v. Pacific Automobile Indemnity Exchange* (Cal.Sup.) 46 P.2d 143) which deal directly with this class of policy; and in each case it was held in substance that before the insurer may relieve itself of liability to a third person for any breach of the co-operation clause by the insured occurring subsequent to the happening of the event which makes the policy operative in favor of such third person, it is essential for the insurer to establish by evidence that a material provision of the co-operation clause was breached and that the insured suffered substantial prejudice thereby."

The trial court also cited and relied upon the reasoning in the case of *Allegretto v. Oregon Automobile Insurance Co.*, 140 Or. 538, 13 P.2d 647. The facts are similar in that there, as here, the insured falsely represented that another was driving the car. On that statement an answer was prepared and filed. The true facts were learned shortly before the date of trial, and the answer was amended to conform to the facts. The court there held on appeal that a directed verdict should have been granted in favor of defendant upon the ground that a prejudicial breach of the policy appeared as a matter of law. It is to be noted, however, in the *Allegretto* Case the true facts were not made known until two or three days before the trial; that by an amendment in open court the jury were made acquainted with the facts that the in-

sured was a falsifier, and further, due to the shortness of time intervening between the discovery of the truth and the trial, the company had no opportunity to prepare a defense or consider a settlement.

In the instant case the facts were known to the defendant some six months before the cause came to trial. Also by stipulation, not in open court, an amended answer was filed admitting McClure to have been the driver. The case was tried on the merits, and no reference was made at the trial to the arrest or the plea of guilty by Mr. Davis to the charge of reckless driving, nor was any reference made during the course of the trial that in the original answer which had been filed by the attorneys for the indemnity company, it was alleged that Davis and not McClure was driving. At the trial Davis and McClure stipulated that McClure was acting as the agent of Davis; that McClure was the owner of the truck, and that McClure was driving the truck at the time of the accident. No reference was made at the trial with regard to the original report turned in to the indemnity company, nor to any ground upon which the indemnity company denied liability, nor to the fact that at the time of the accident Davis had told the officer that he, Davis, was the driver of the truck.

In the *Allegretto* Case, supra, the amendment had the effect of apprising the jury of the fact that one of the insured had not, in the first instance, told the truth. It will also appear in the *Allegretto* Case, supra, that the insurance company had a substantial defense as to liability, for in that case there was a dispute as to who was driving the car, and under the policy in that case if he were not the driver of the car, no liability at all existed as far as the company was concerned.

Here, judgment was against both McClure and Davis. It did not matter which of the parties was driving because both were equally insured, for in the instant case the policy specifically provided under its omnibus clause that any person legally operating the automobile with the permission of the owner was covered by the terms of the policy.

Norton v. Central Surety, etc., Co., 9 Cal. App.2d 598, 51 P.2d 113, is an action against an insurance carrier to recover the amount of a judgment previously obtained against the insured. The defense on the part of the company was a breach of the cooperation clause in the policy. The jury found

against the company and judgment was entered, from which it appealed. Without quoting at length, the reviewing court, on appeal, held that the issue as to whether there had been a lack of cooperation sufficient to constitute a breach of the policy was one of fact, citing several cases in support thereof, and also citing the Hynding Case and the Panhans Case to the effect that a violation of the conditions regarding the cooperation on the part of the insured was not a valid defense against an injured person unless it clearly appeared the insurance company was substantially prejudiced thereby, and the burden of proving both the breach and the prejudice was upon the insurer. In the case now before us the implied findings of the jury were against the insurance company.

Appellants cite several cases from foreign jurisdictions in support of their contention. Among others is *Petersen v. Preferred Accident Ins. Co. of N. Y.*, 114 N.J. L. 180, 176 A. 897, where the insured failed to make a statement that he had been driving, and had informed the company that the driver had been another, and gave as his reason therefor, if the real driver had become known it would have appeared that he had no driver's license and that he would have been arrested therefor. The court held that regardless of what the truth may have been, he did, before the trial, cooperate and truthfully state the real facts.

In *Rockmiss v. New Jersey Manufacturers' Ass'n Fire Ins. Co.*, 112 N.J.L. 136, 169 A. 663, the assured gave one statement, but about a month later gave the company a further statement to the effect that his original version was not true. The insurance company claimed that because of the original statement they were deprived of making an advantageous settlement of the claim. The court held that the company, having had ample time to investigate and prepare for trial, suffered no detriment by reason of the alleged breach of the provisions of the contract.

[4] Furthermore, an examination of the cooperation clause in the policy in the instant case reveals that there is no forfeiture clause contained therein, and forfeiture not being favored either in law or in equity, will not be enforced unless the right thereto is clear and certain. *Shirley v. American Automobile Insurance Company*, 163 Wash. 136, 300 P. 155. That omission was also noted in the Hynding Case, *supra*.

From an examination of the entire record before us we rather believe the real question here was not one of contributory negligence but of the amount of liability only. The report of the special agent of the company sent to investigate the accident reveals that Mr. Valladao was driving along the highway when a blowout occurred, causing the rim of the rear wheel to lock itself about the wheel, making it impossible to move the car. He left the car and his guests while he went to Santa Rosa for a mechanic. On the rear of plaintiffs' car was a four-inch floodlight burning, and one of the women in the party also stood behind the car with a flashlight to warn approaching traffic. The road was dry, and the night clear. More than a dozen cars had passed without any trouble whatever. Many witnesses would testify as to the presence of the large white light and the red tail-light, both clearly visible. A straight road of one-half to three-quarters of a mile extended back from the stalled car. The recommendation of the investigator was,

"There is no question but that we are absolutely liable and should endeavor to get out of it the best way we can."

From what has been said, and what is shown by the record, we cannot say that the company was prejudiced by the conduct of its assured as a matter of law.

The judgment of the trial court must therefore be reversed, and it is so ordered.

I concur: THOMPSON, J.

26 Cal.App.2d 390

HAMILTON et ux. v. FERGUSON et al.

Civ. 2203, 2204.

District Court of Appeal, Fourth District,
California.

May 17, 1938.

1. Contracts ⇨147(1)

The fundamental canon of construction applicable to contracts generally is ascertainment of parties' intention. Civ.Code, § 1636.

2. Contracts ⇨147(3)

Although language of agreement, if clear and explicit and not conducive to an absurd result, must govern in interpretation, a portion only of a written instrument, although clear and explicit, may not be selected as furnishing conclusive evidence of parties' intention. Civ.Code, §§ 1638, 1641.

3. Evidence ⇨450(3)

In action to construe written instrument containing language indicating that it granted a fee title to an undivided one-half interest in land as described, but which also stated that land was for permanent use as a reservoir site and irrigation work, instrument was sufficiently uncertain to justify resort to extrinsic evidence for purpose of showing intent of grantor in executing instrument. Civ.Code, § 1641.

4. Appeal and error ⇨1012(1)

The weight of parol evidence introduced to show grantor's intent in executing written instrument was matter confided to trial court's broad discretion in interpreting that instrument.

5. Appeal and error ⇨1011(1)

The reviewing court may not disturb any finding based on conflicting evidence.

6. Appeal and error ⇨1011(1)

It was exclusive function of trial court to resolve whatever conflict appeared in grantor's testimony concerning whether instrument granting land for permanent use as a reservoir site and irrigation work was intended to convey fee title or merely an easement, and court's conclusion that instrument, which in its entirety indicated intention to convey nothing more than an easement, conveyed an easement only would not be disturbed on appeal. Civ.Code, § 1641.

7. Evidence ⇨313

In suit involving question of whether lease agreement was supported by considera-

tion, reference, in letter written to lessor by lessee's husband, to a deed to be drawn "as per our understanding" was purely self-serving, and its weight as evidence corroborating testimony of husband concerning execution of agreement was materially affected by that fact.

8. Cancellation of Instruments ⇨47

In suit to cancel alleged lease, evidence relating to whether or not lease contract was executed by lessors pursuant to an agreement for rescission of a sales contract previously entered into by lessor with lessee's father supported finding that there was an entire want of consideration to support agreement, which recited a nominal consideration of \$1 which had never been paid.

9. Cancellation of Instruments ⇨53

A finding properly supported that lease agreement was unsupported by consideration justified entry of decree canceling lease and quieting lessors' title to land described therein. Civ.Code, §§ 1689, 3406, 3412.

10. Appeal and error ⇨934(2)

The presence of a single, clear and sufficient finding properly supported upon which judgment may rest justifies conclusion that trial court based judgment on such finding.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Suit by John K. Hamilton and wife against Grace M. Ferguson, Roy N. Ferguson and Lillian E. Hamilton to quiet title to certain lands, to obtain a decree canceling a lease agreement and to obtain declaratory relief in the interpretation of a written instrument. Decree for plaintiffs and the first two named defendants and the last-named defendant prosecuted separate appeals.

Decree affirmed.

Osborn & Burum and John M. Shortridge, all of Bakersfield, for appellants Grace M. Ferguson and Roy N. Ferguson.

Siemon & Clafin, of Bakersfield, for appellant Lillian E. Hamilton.

Edward West and Frederick W. Welsh, both of Bakersfield, for respondents.

JENNINGS, Justice.

The complaint filed by plaintiffs in this suit contains three causes of action. By the first cause of action plaintiffs sought to quiet their title to certain land against

claims thereto of the defendants Roy N. and Grace M. Ferguson, which were alleged to be without right. By the second cause of action plaintiffs sought to obtain a decree canceling a lease agreement covering the same real property described in the first cause of action in which agreement plaintiffs were lessors and the defendant Grace M. Ferguson was lessee. By the third cause of action plaintiffs sought declaratory relief in the interpretation of a certain written instrument which related to a portion of the same land mentioned in the two preceding causes of action. Upon the conclusion of the trial a decree was entered whereby it was adjudged that plaintiffs are owners of the fee simple title to the land described in the first two causes of action, that the lease agreement mentioned in the second cause of action be canceled, and that the defendant Lillian E. Hamilton is the owner of an easement for joint use with plaintiffs of a reservoir site and irrigation work on the land described in the third cause of action. From the decree thus entered the defendants Roy N. Ferguson and Grace M. Ferguson and the defendant Lillian E. Hamilton have prosecuted separate appeals. For the sake of convenience and because the instrument wherein Lillian E. Hamilton is mentioned antedates the lease agreement described in the second cause of action the appeal of defendant Lillian E. Hamilton will first be considered.

Appeal of Defendant Lillian E. Hamilton.

The written instrument which plaintiffs sought to have interpreted by their third cause of action is as follows:

"This indenture made this fourth day of September, 1913, between John K. Hamilton of the County of Tulare, State of California, party of the first part, and Lillian E. Hamilton of the County of Kern, State of California, party of the second part, Witnesseth:

"That the party of the first part for and in consideration of Ten (10) dollars lawful money and other valuable consideration to him in hand paid by said party of the second part, the receipt of which is hereby acknowledged, does hereby *grants*, to the party of the second part, the following tract of land in the County of Kern, State of California, for the permanent use as a reservoir, *sight* and irrigation work, to-wit: an undivided one half interest in and to the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 22, T. 29 S., R. 24 E., M.D.M. together with an undivided one half

interest in and to all of the pumping machinery, pumping plant, water well and the water flowing therefrom or to be developed therein, which are situated on said land.

"The purpose of this deed being to recognize the interest of the party of the second part in said land, water well, pumping plant and water right, to be used in irrigating the land in her Desert Land Entry which embraces the NW $\frac{1}{4}$ of the said section 22.

"Also an undivided one half interest in and to the main water ditch or water way, running from said well in a generally north westerly direction to a point on the north line of the said SE $\frac{1}{4}$ of said section, about twenty rods east of the northwest corner of said south east quarter.

"Witness my hand the day first above written.

"John K. Hamilton."

Several contentions are advanced by the appellant, Lillian E. Hamilton, as grounds for reversal of that part of the judgment which applies particularly to her claim that she is the owner of the title in fee to an undivided one-half interest of the real property described in the above-mentioned instrument. These contentions briefly are: First, that the quoted language of the instrument is free from ambiguity and constitutes a conveyance to appellant of an unconditional fee title to an undivided one-half interest in the property; second, that the trial court erred in receiving parol evidence for the purpose of showing the intent of the grantor in executing the instrument; third, assuming that parol evidence was properly admitted the trial court's implied finding that the intention of the parties to the instrument was that an easement rather than title to the land should be conveyed is contrary to the weight of the evidence and hence lacks proper evidentiary support.

It may be conceded that the primary problem presented on this appeal consists of a determination of whether or not the language of the document is sufficiently certain and definite to render unnecessary a resort to extraneous evidence respecting the circumstances surrounding the execution of the instrument, the situation of the parties, and their intention in executing it. In connection with this problem it may be remarked in passing that a determination of unambiguity of terminology would not necessarily lead to a conclusion of prejudicial error in the admission of extraneous evidence since it might conceivably appear from an examination of the verbiage of the entire

document that the parties intended that an easement only should be conveyed in which event the admission of parol evidence for the purposes heretofore mentioned, although erroneous, could not be considered prejudicial. Appellant evidently recognizes the possibility of such a holding as her entire argument is founded on the premise that the language employed in the document is not only certain and definite but also that thereby fee title to an undivided interest in real property was conveyed to her.

Appellant's insistence that the very language of the deed is of itself indicative of an intent on the part of the grantor to convey a fee title in land is based principally on the significant phraseology of the instrument which, omitting reference to consideration, declares: "The party of the first part * * * does hereby grant, to the party of the second part, the following tract of land." It is declared that this language is clear and definite and is the traditional verbiage employed in deeds which convey fee title to land. It is further observed that if the language which refers to a reservoir site and irrigation work is omitted there is then immediately following a complete description of the land conveyed consisting of "an undivided one half interest in and to the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of section 22, T. 29 S., R. 24 E., M.D.M." It is further pointed out that the initial language of the next succeeding paragraph which purports to express the purpose of the deed as "being to recognize the interest of the party of the second part in said land" is most pertinent and is indicative of a clear intent on the part of the grantor to convey not a mere easement but title to the land.

[1,2] It must be conceded that if only the language quoted upon which appellant relies with so much assurance is considered the conclusion is irresistible that appellant's contention is correct and that the instrument must be construed as a grant of fee title to an undivided one half interest in the land described. However, unfortunately for appellant, there is other language contained in the instrument which must also be taken into consideration. The fundamental canon of construction which is applicable to contracts generally is the ascertainment of the intention of the parties, Civ. Code, § 1636, and in accordance with section 1638 of the Civil Code the language of the agreement, if clear and explicit and not conducive to an absurd

result, must govern its interpretation. However, this does not mean that a portion only of a written instrument, although it is clear and explicit, may be selected as furnishing conclusive evidence of the intention of the parties. Section 1641 of the Civil Code lays down the true rule in providing that "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Application of the rule announced in the last-mentioned section makes it necessary, therefore, to give consideration to certain other language which appears in the document. It is apparent that the most significant of such other terminology is the language which occurs immediately preceding the legal description of the land to which the instrument relates. This language is as follows: "for the permanent use as a reservoir, sight and irrigation work." It is conceded by appellant that the word "sight" should be "site" and that the word "reservoir" modifies "site". The comma which appears after the word "reservoir" may therefore be omitted and the language then reads: "for the permanent use as a reservoir site and irrigation work". This language would appear to amount to an express statement of the purpose for which the land thereafter described may be used or, in other words, a specific limitation of the use to which the land may be put by the grantee. It must further be observed that the initial language of the next succeeding paragraph upon which appellant relies, which is: "The purpose of this deed being to recognize the interest of the party of the second part in said land" is accompanied by other verbiage which distinctly qualifies the meaning of the last-quoted language. The complete paragraph is as follows:

"The purpose of this deed being to recognize the interest of the party of the second part in said land, water well, pumping plant and water right, to be used in irrigating the land in her Desert Land Entry which embraces the NW $\frac{1}{4}$ of the said section 22."

The words "to be used in irrigating the land in her Desert Land Entry" again introduces the element of the express use to which not only the pumping plant and water right but the land itself is to be put by the grantee and apparently constitutes a definite limitation on the grant.

ee's "interest * * * in said land" which is "recognized".

[3,4] When, therefore, the phraseology of the entire instrument is considered in accordance with the admonition contained in section 1641 of the Civil Code it would appear that the intention of the parties was that the grantee should have the right to use the land for a reservoir site and for such other purposes as would facilitate the irrigation of her own land located in the northwest one-fourth of the same section in which the land described in the deed is located. The express qualification of the use to which the land might be put indicates an intention to convey not the extensive interest comprehended by the grant of a fee title but the limited interest contemplated by an easement. It is our opinion that, viewing the whole instrument most favorably to appellant, the trial court might reasonably have concluded that there is sufficient uncertainty of terminology to justify a resort to extrinsic evidence for the purpose of discovering the all-important element of intent and that no error was therefore committed in the admission of parol evidence of which appellant complains. The effect of such evidence may properly next be considered but in so doing it must be borne in mind that the weight of the evidence is a matter which was confined exclusively to the broad discretion of the trial court and also that if any evidence was produced which supports the trial court's conclusion that the deed of September 4, 1913, conveyed no more than an easement in the land such conclusion may not be disturbed.

[5] Examination of the record shows that the only evidence having any bearing on the circumstances surrounding the execution of the instrument which was offered and received during the trial consisted of the testimony of the respondent, John K. Hamilton. This witness testified that about the time the deed was executed his brother, Scott Hamilton, appellant's deceased husband, filed a desert entry on the N. W. $\frac{1}{4}$ of section 22 and the witness filed a similar entry on the S. E. $\frac{1}{4}$ of the same section, that the 10-acre tract described in the deed was the highest land on both sections and was therefore the logical place whereon to drill a well whereby the remaining land in both quarter sections might be irrigated for the purpose of carrying on the work which the

law required to be done in order to procure issuance of patents to the two quarter sections of land from the U. S. government, that prior to executing the deed the witness raised the question that as he had no deed or patent to the land he could not legally execute a deed conveying any interest in it but was informed by the person who prepared the instrument at Scott Hamilton's request that he could legally execute it in the form in which it was drawn, that the witness thereupon signed the deed intending to convey merely a water right in the land described in the deed, that thereafter a well was drilled on said land and water produced by the well was used to irrigate the remaining land in both quarter sections until a patent to the N.W. $\frac{1}{4}$ of section 22 was issued to appellant in 1921 after which time no further use was made of the well, that the witness paid all taxes assessed against the land described in the deed of September 4, 1913, from the time he procured a patent in 1920 up to the date of trial. While it is true, as appellant points out, that this witness during the course of his examination did testify that there was an understanding between his brother, Scott Hamilton, and himself that the two of them should have an equal interest in the 10 acres described in the deed, the effect of this testimony was merely to create a conflict between such testimony and other testimony of the witness bearing on his intent in executing the deed to which reference has heretofore been made. Obviously if the witness in executing the deed intended to grant no more than an easement in the land described such intent was inconsistent with an "understanding" that he and his brother should have "an equal interest" in the 10-acre tract described in the deed. However, such inconsistency is subject to the familiar rule of appellate procedure which prohibits disturbance of any finding based on conflicting evidence. *Peterson v. Gilbert*, 83 Cal.App. 542, 257 P. 140; *Van Derhoof v. Chambon*, 121 Cal.App. 118, 124, 8 P.2d 925.

[6] Moreover, with regard to the inconsistency in the testimony of the witness, John K. Hamilton, to which reference has been made, it should be borne in mind that the very deed with respect to whose execution the testimony of the witness related was before the court. As heretofore observed the phraseology em-

played in this document, taken in its entirety, pointed strongly to an intention of the parties thereto that the instrument should convey nothing more than an easement. It is not strange, therefore, that the trial court accepted the testimony of the witness which indicated that the intention of the parties at the time the deed was executed was that an easement in the land rather than title in fee should be conveyed. In any event, it was the exclusive function of the trier of facts to weigh the evidence and to resolve whatever conflict appeared therein and his conclusion that the deed conveyed merely an easement in the land may not, under the circumstances here appearing, be disturbed.

Appeal of Defendants Grace M.

Ferguson and Roy N. Ferguson.

The principal contention advanced by these appellants for reversal of that portion of the judgment which relates particularly to them is that the trial court's finding that no consideration of any kind was given to respondents for the execution of the lease agreement which was the basis of the first two causes of action alleged in the complaint is not supported by the evidence. Consideration of this contention necessitates some reference to the evidence bearing on this phase of the case which was produced during the trial.

The lease contract was executed by respondents as lessors and appellant Grace M. Ferguson, as lessee, on November 17, 1922. The consideration expressed therein is the sum of \$1, receipt of which is acknowledged. The property leased is "all the oil rights contained" within the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of "sec. twenty-two (22) twenty-nine (29) twenty-four (24) for the purpose and with the exclusive privilege of drilling and operating for oil on said land and of extracting said oil therefrom". The term of the lease is 25 years.

The evidence produced which related to the execution of the agreement showed that in the early part of 1921 the respondents entered into a contract with the father of appellant Grace M. Ferguson, whereby the former agreed to sell and the latter agreed to purchase 80 acres of land in said section 22 at the price of \$100 per acre to be paid in instalments. Two payments of \$1,000 each were made on the purchase price. On May 24, 1922, a further payment of \$2,000 became due under the terms of the contract. This payment was not made

and the sale contract was rescinded by mutual consent. Subsequently the agreement of lease to which reference has heretofore been made was executed. It was the contention of appellants that the lease was made by respondents pursuant to an agreement for rescission of the sale contract and that prior to May 24, 1922, respondent John K. Hamilton agreed that if the sale contract were rescinded and he were permitted to retain the \$2,000 which he had received under the contract he would execute a lease to the purchaser which would cover 20 acres of the land described in the sale contract for a term of 25 years.

The evidence upon the feature of consideration for the making of the lease was conflicting. Respondent John K. Hamilton testified that the appellant Roy N. Ferguson, who was apparently acting for his father-in-law, stated to him at the time the \$2,000 payment became due that he could not make any additional payments on the sale contract, that the witness inquired about obtaining the copy of the sale contract which the purchaser had in his possession and Ferguson told him to destroy the copy which the witness had and that would be the end of it, that nothing was said at that time about making a lease, that probably a year later the witness had another conversation with Roy N. Ferguson, at which time Ferguson said he hated to lose the money which had been paid on the sale contract as it was his wife's money and inquired if the witness couldn't give him something, to which the witness replied that the purchaser had received his money's worth but as it was "a bad family situation" he might give him a lease covering 20 acres of the land. On the other hand the appellant, Roy N. Ferguson, testified that some time prior to May 24, 1922, he saw respondent, John K. Hamilton, at which time he reminded Hamilton that he, Ferguson, was the person who had made the original report which "started the excitement in Buttonwillow"—Buttonwillow apparently being the popular name for the particular locality in Kern county in which the land is situated—that the witness was a geologist and if he had some property there, would be in a position to attempt to revive the activity in the Buttonwillow district, that the witness was not in a position to carry out the original purchase contract and accordingly would return it to him in exchange "for the fee mineral rights, as I worded it on the ten acres" and that

Hamilton said he would draw up such a document and mail it to the witness which was done a month later. This witness further testified that he did return the original sale contract between his father-in-law and respondents on May 28, 1922, and in corroboration of his testimony in this regard a carbon copy of the letter which was enclosed with the sale contract when it was returned to John K. Hamilton was introduced in evidence. The letter thus placed in evidence is in the following language:

"Corcoran, Calif.

"May 29, 1922."

"Mr. J. K. Hamilton, Jr.,

"Delano, Calif.

"Dear Mr. Hamilton:—

"In accordance with our recent understanding I am enclosing my copy of the agreement which we had in regard to the NW¼ of the SE¼ of Sec. 22 T 29 S R 24 E, MDM.

"I have never recorded the agreement so that all you need do to clear your title is to destroy both copies. In drawing up the deed to the oil and gas rights on the ten acres of this tract, as per our understanding, it would simplify matters for me if you would make the papers out in the name of my wife, Grace M. Ferguson, instead of Thomas Bodley. This however, is of no great consequence, and if for any reason you would prefer to have the new papers made out in the same name we can fix it up later.

"Yours very truly,

"R. N. Ferguson,

"Box 366, Corcoran, Calif."

[7,8] Much reliance is placed by appellants on this exhibit which it is declared fully corroborates the above-described testimony of the witness, Roy N. Ferguson. It is particularly relied on as evidence conclusively contradicting the testimony of respondent, John K. Hamilton, to the effect that nothing was said about giving a deed or a lease at the time the conversation regarding the destruction of the original sale contract occurred. It is pointed out that the letter bears the date May 29, 1922, and that it contains the significant suggestion that it would simplify matters for the writer, Ferguson, if Hamilton "in drawing up the deed to the oil and gas rights on the ten acres of this tract, *as per our understanding*" (italics ours) would make out the papers in the name of the writer's wife instead of in the name of Thomas Bodley, who was Ferguson's father-in-law. It is

observed that the initial paragraph also refers to "our recent understanding". It must be conceded that this evidence did tend to contradict the testimony of Hamilton that it was "probably a year" after the conversation concerning the destruction of the written sale agreement when Roy N. Ferguson complained that the \$2,000 paid on the sale contract was his wife's money which he hated to lose and when Hamilton said that since it was a bad family situation he might give him a lease covering 20 acres of the land. However, it must be observed that although the letter of May 29, 1922, tended to some extent to corroborate the testimony of Ferguson, nevertheless there was still a direct conflict in evidence as to whether or not Ferguson, acting for his father-in-law, consented to a rescission of the sale contract in exchange for Hamilton's promise to convey some sort of interest in the mineral rights to 10 acres at a time when the purchaser was not in default under the terms of the sale contract. In the second place, it is worthy of mention that the letter of May 29, 1922, upon which these appellants place so much reliance, was written by the appellant Ferguson. The significant reference to a deed to be drawn "as per our understanding" is the language of Ferguson. It is purely self-serving and its weight as evidence is therefore materially affected by this important fact. It may be assumed that the trial court had this qualification in mind in giving consideration to the contents of the letter. In the third place, it must be noted that the letter refers specifically to a deed, whereas, the instrument upon which appellants rely is a lease and it is a lease not to 10 acres but to 20 acres of land. There is also no dispute that the lease which bears the date of November 17, 1922, was actually sent to R. N. Ferguson on November 21, 1922, as shown by Hamilton's letter of the last-mentioned date which was enclosed with the lease. This was approximately 6 months after the date on which the payment of \$2,000 under the provisions of the sale contract was due and almost the same length of time after the date on which appellant Ferguson returned the sale agreement to Hamilton with the statement that he had never recorded the agreement and that accordingly Hamilton need only destroy both copies of the contract in order to clear his title. It was the lease which respondents sought by their second cause of action to have canceled and it was likewise the lease which constituted a cloud on their

title that respondents sought to have quieted by their first cause of action. Respondent, John K. Hamilton, testified positively that the nominal consideration of \$1 expressed in the lease was never paid to him. The record shows that this testimony stood uncontradicted. The evidence was ample to establish that the contract for the sale of the 80 acres was rescinded by mutual consent of the parties to the contract. As heretofore observed, appellants endeavored to show that their agreement to rescind the sale contract was made in consideration of a promise by respondents to give them a lease to 20 acres of the land described in the sale contract and that the lease sought to be canceled was given pursuant to respondents' promise. If, however, the purchaser under the sale contract was in default when the promise to give the lease was made or if the sale contract had been effectually rescinded before respondents agreed to give the lease there was then no consideration for the lease and, like any other agreement unsupported by consideration, it could properly be canceled and respondents would be entitled to have their title quieted against any claims of appellants based thereon. It is our conclusion from an examination of the record that the trial court's finding of an entire want of consideration to support the lease agreement is not so lacking in evidentiary support as to justify its disturbance. Appellants make no contention that the lease agreement, if entirely unsupported by consideration, could not properly be ordered canceled. Such contention, if made, would obviously be unavailing. Civ.Code, §§ 1689, 3406, 3412; Pennell v. Stanley W. Smith, Inc., 204 Cal. 540, 269 P. 171; Hironymous v. Hiatt, 52 Cal.App. 727, 199 P. 850.

[9,10] Appellants also attack the trial court's legal conclusion that appellant Grace M. Ferguson had abandoned any right, title, or interest in the land she might ever have been entitled to claim under the lease agreement. It is unnecessary to give consideration to this contention in view of our conclusion that the finding of want of consideration for the lease is not lacking in evidentiary support. The presence of this finding properly supported is sufficient to justify the entry of a decree canceling the lease and quieting the title of respondents to the land described in the lease even though it might appear that the court incorrectly concluded that the lessee had abandoned whatever interest she claimed to

have in the land under the terms of the lease. The presence of a single clear and sufficient finding properly supported upon which the judgment may rest justifies the conclusion that the trial court based its judgment on such finding. American National Bank v. Donellan, 170 Cal. 9, 15, 148 P. 188, Ann.Cas.1917C, 744; In re McNamee, 131 Cal.App. 30, 32, 20 P.2d 722.

For the reasons stated herein the judgment from which the separate appeals have been taken is in all respects affirmed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 345

O'HARE et al. v. PEACOCK DAIRIES, Inc.
Civ. 1843.

District Court of Appeal, Fourth District,
California.

May 14, 1938.

Rehearing Denied June 13, 1938.

Hearing Denied by Supreme Court
July 12, 1938.

1. Appeal and error ☞931(1)

On appeal, evidence most favorable to the prevailing party must be taken as true, and all conflicts must be disregarded.

2. Appeal and error ☞1011(1)

In action for breach of contract whereby defendant agreed to buy and plaintiffs to sell all of the milk produced by plaintiffs on their ranches, whether defendant was justified in refusing to accept milk on ground that plaintiffs had continually breached their contract by producing inferior milk was for trial judge under conflicting evidence.

3. Appeal and error ☞1011(1)

The reviewing court may not disturb a finding or reverse a judgment merely because of conflicts in evidence.

4. Evidence ☞450(8)

Parties to a contract for the sale of milk produced from tuberculin tested cows under grade A inspection, entered into when term "grade A milk" was defined by statute as both grade A raw and grade A pasteurized milk, must have intended to use term as defined by statute, and contract contain-

ed no ambiguity that could be explained by parol evidence, as against contention that state dairy inspector must have found conditions justifying production and sale of grade A raw milk. St.1927, p. 1947, § 3(a, d).

5. Sales ⇨176(6)

Breaches, if any, by sellers, of contract to sell milk produced from tuberculin tested cows under grade A inspection before date when state dairy inspector made inspection on which buyer acted in terminating contract were waived by buyer's continuing to accept and pay for milk at contract prices.

5. Sales ⇨72(5)

Under contract to sell milk produced from tuberculin tested cows under grade A inspection, phrase "grade A inspection" was used to establish standard or grade of milk to be delivered by sellers to buyer, and that standard or grade could be proved by evidence of a state inspector or of any other qualified person, and contract did not require that inspection be made exclusively by a state inspector. St.1927, p. 1947, § 3(a, d).

"Inspection" is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations. "To inspect" means to look; to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of the thing or for the purpose of discovering and correcting errors.

[Ed. Note.—For other definitions of "Inspect; Inspection," see Words & Phrases.]

7. Fraud ⇨58(1)

Ordinarily, fraud must be established by circumstantial evidence.

8. Appeal and error ⇨1008(3)

Where a contract contains an ambiguity subject to explanation and construction, the question of its proper construction is first addressed to the trial judge, and if the conclusion reached by him is not unreasonable, it will be supported on appeal.

9. Appeal and error ⇨1008(3)

Under contract for the sale of milk produced from tuberculin tested cows under grade A inspection, if word "inspection" could be defined in its usual sense and also as meaning inspection by state dairy inspectors only, there was an ambiguity, and trial

judge's construction permitting testimony of witnesses other than state dairy inspectors concerning rating to which dairy was entitled was not unreasonable and would be accepted by reviewing court.

10. Sales ⇨177

Where trial court found on sharply conflicting evidence that sellers had performed under their contract to sell milk produced from tuberculin tested cows under grade A inspection and that buyer had wrongfully refused to accept milk, sellers were entitled to recover proper damages.

11. Sales ⇨384(3)

Milk from cows in sellers' possession at time of breach of contract by buyer had sufficient "potential existence" to enable sellers to invoke rule of damages governing breach of contract for the sale of a product in being and in possession at time of breach, and hence sellers could recover the difference between the contract price and the selling price obtained on the open market. Civ.Code, § 1784.

[Ed. Note.—For other definitions of "Potential Existence," see Words & Phrases.]

12. Sales ⇨384(1)

Where a buyer breaches an indivisible contract, seller, not being at fault, may recover damages sufficient to compensate him for all detriment caused by breach and need not keep himself in a position to perform after breach, and prospective loss to the end of the term of the contract may be compensated in damages, provided prospective damages are capable of sufficiently accurate computation so as not to violate the rule against uncertain and speculative damages. Civ.Code, § 3300.

13. Contracts ⇨309(2)

Where the existence of a specific thing or person is necessary for the performance of a promise in a bargain, either by the terms of the bargain or in the contemplation of both parties, a duty to perform the promise is discharged if the thing or person is subsequently not in existence in time for seasonable performance, unless a contrary intention is manifested, or the contributing fault of the promisor causes the nonexistence.

14. Sales ⇨384(1)

A contract to sell all of the milk produced on sellers' dairy ranches for 10 years was an indivisible contract, and sellers, who

sold their herd of cows after breach of contract by buyer, could not recover prospective damages from time of sale of herd to end of term of contract, since prospective damages could not be fixed with any degree of exactness. Civ.Code, § 3300.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by James M. O'Hare and Peter C. O'Hare, as copartners doing business under the firm name and style of O'Hare Bros., against Peacock Dairies, Inc., for damages for breach of contract for the sale of milk. From a judgment for plaintiffs, defendant appeals.

Reversed and remanded for a new trial, with directions.

Harvey, Johnston & Baker, of Bakersfield, for appellant.

Joseph Scott, of Los Angeles, and Claffin & Dorsey, of Bakersfield, for respondents.

MARKS, Justice.

This is an action for damages for breach of contract for the sale of milk. Plaintiffs had judgment and defendant has appealed.

Plaintiffs were dairymen in Kern County. They produced milk which they sold to defendant, a distributor of milk and milk products, under a written contract between defendant's predecessor and plaintiffs. The contract was dated March 26, 1929, and had been executed by the Kern County Creameries & Farm Company, defendant's predecessor, party of the first part, and plaintiffs, parties of the second part. Defendant assumed all the obligations of the contract which had rested upon its predecessor.

The provisions of the contract pertinent to this appeal are as follows:

"That said first party covenants and agrees to purchase of and from second parties, their successors and assigns, and said second parties for their successors and assigns agree to sell to first party all milk produced upon and from dairy ranches of second parties, at a rate per pound butter fat twenty-five cents (25¢) in excess of Los Angeles, butter quotation, the purchase price however to be not less than seventy cents (70¢) per pound butter fat irrespective of Los Angeles quotations; * * *

"It is further mutually agreed that this contract shall remain in force for a period of ten years and that the milk agreed to be

purchased and sold pursuant to the conditions hereof, shall be all the milk so produced from and upon said ranches, for a period of ten years from and after the date hereof; * * *

"It is expressly provided, however, and one of the conditions of this agreement, that the whole of said milk shall be produced from tuberculin tested cows under grade A inspection, except that no penalty shall be imposed for an occasional high bacteria count."

Defendant maintains the evidence conclusively established that plaintiffs continually breached their contract by producing inferior milk, at times so poor that it was unfit for human consumption; that defendant was justified in refusing to accept such milk and therefore is not liable for any damages as plaintiffs were continually in default and not in a position to perform under the terms of the contract.

As a second ground for reversal defendant maintains that the evidence fails to support the findings and judgment as to the amount of damages awarded plaintiffs. In Civil No. 1842 Cal.App., 79 P.2d 443, plaintiffs have appealed from that portion of the judgment which fixed their damages at \$10,158.24. Their appeal is supported by a separate record. However, as it is maintained in the appeal in this case that the amount of damages awarded is contrary to the evidence and is not supported by any evidence, and as the question of damages is squarely before us here, we will consider it in this opinion. In order to avoid repetition in the opinion in Civil No. 1842 we will, in this opinion, consider the arguments made and the authorities cited in both appeals.

Defendant's brief contains a rather clear summary of the facts upon which it relies for a reversal on this appeal. That summary is as follows:

"At or before the time when the contract was made plaintiffs were not only producing milk on their dairy ranch, but were also engaged in distributing market milk in the Bakersfield community of Kern County. By market milk is meant principally grade 'A' raw milk, although plaintiffs owned some pasteurizing equipment and also distributed some pasteurized milk. Defendant purchased the entire milk distributing business, equipment and good will from plaintiffs and commenced purchasing the milk by plaintiffs produced on their ranch, and actually received plaintiffs' milk

and paid contract price therefor from March 26, 1929, until noon of June 24, 1933, when further deliveries were completely and finally refused by defendant in conformity to written notice to such effect then served by defendant on plaintiffs.

"March 12, 1932, State Dairy Inspector Lucas on behalf of Kern County Health Department officially degraded plaintiffs' dairy and barred plaintiffs' milk from market in Kern County for grade 'A' milk purposes. Plaintiffs never effected a raising of this ban which continued to, and was in effect on, noon of June 24, 1933, and thereafter so that defendant, from and after March 12, 1932, was officially denied the local county market contemplated by the parties when the contract was entered into and the Bakersfield milk distributing business and equipment was purchased of plaintiffs by defendant. October 24, 1932, State Dairy Inspector Holt on behalf of the Pasadena Health Department officially barred plaintiffs' milk from Pasadena for any purpose. * * * Between October 24, 1932, and June 24, 1933, plaintiffs' milk was marketed for cream purposes through defendant in Los Angeles. During this period State Dairy Inspectors White and Ladd were in charge of the Kern County area and adjoining areas for the Los Angeles Health Department, Inspector White being stationed at Tulare in general charge of the technical laboratory there as well as the field work. Inspector Ladd did the field work for that Department in Kern County during this period. At trial the Court restricted the evidence as to condition of plaintiffs' dairy to the period following January 1, 1933. It appears that Inspector Ladd carefully and in detail inspected plaintiffs' dairy several times between January 1, 1933, and June 24, 1933. The evidence is to the effect that on June 23, 1933, and at other times the dairy was not a grade 'A' dairy, that the milk was not grade 'A'; and that streptococci infection in dangerous amounts was present on one occasion when a definite test was made; and that on June 23, 1933, he excluded the dairy officially for grade 'A' purposes; that this ban continued to June 28, 1933; that on June 28, 1933, the dairy was restored to a grade 'A' cream basis for the Los Angeles market.

"In addition to testimony of official inspectors as to the basic conditions of plaintiffs' dairy which occasioned the exclusion orders above mentioned, considerable evi-

dence was received from witnesses who were not State Dairy Inspectors, and who were not entitled to qualify the milk 'under grade A inspection' as provided by the contract. In this connection it appeared that the milk sold defendant by plaintiffs during all the time Martin Pedersen was plant manager, commencing March 1, 1931, was never used by defendant for grade 'A' raw milk purposes contemplated by the contracting parties and that after the Pasadena shutoff in October, 1932, the milk was used only for manufacturing purposes even though the value of milk for pasteurizing was materially less than for raw milk, and the value of milk for manufacturing was materially less than for pasteurizing.

"On the evening of June 22, 1933, after receipt of the official order of Inspector Ladd, defendant notified plaintiffs that no further milk would be accepted from their dairies, because plaintiffs had failed to supply defendant with grade 'A' milk in accordance with the terms of the contract, and no milk was thereafter received by defendant from plaintiffs' dairy under the contract.

"Plaintiffs continued operation of their dairy until December 1, 1935, when they disposed of their herd and discontinued production."

[1] The foregoing facts are taken largely from the testimony of defendant's witnesses and is the evidence most favorable to defendant. In making this summary counsel for defendant overlook the time-honored rules that on appeal evidence most favorable to the prevailing party must be taken as true and all conflicts disregarded.

[2,3] Plaintiffs' evidence may be summarized as follows: That they regularly employed a qualified veterinarian who inspected the cattle at least twice each month; that the cows were in excellent health and in good condition; that they were given the tuberculin test once each year and that the herd was free from infection; that a bacteria count of the milk was taken about once each month by a qualified bacteriologist in the employ of the county of Kern; that the counts showed the milk to be excellent; that the milk house, barns, equipment and premises were kept clean and sanitary; that the cows were washed regularly; that much of the equipment used was either purchased through defendant or was recommended by its officers; that every improvement in the

premises or equipment recommended by dairy inspectors or the officers of defendant was promptly made; that the dairy was entitled to a rating that would permit it to sell grade A raw milk; that the milk was excellent; that after defendant refused to further accept plaintiffs' milk it was sold to other distributors under the classification of grade A and was so classified and paid for until plaintiffs sold their herd on December 1, 1935.

A dairy inspector testified that he inspected the dairy on June 22, 1933, and found conditions deplorable; that he found a used strainer cloth which was foul with offal, dirt and other filth and had on it garget caused from mastitis indicating a diseased condition of the mammary gland which causes the production of impure milk not fit for consumption in its raw state. Other witnesses testified to the presence of garget in the milk, its high bacteria count and general unfitness for classification as grade A milk.

Plaintiffs produced witnesses who flatly contradicted this evidence in all particulars or made thorough explanation of it. One witness testified that the strainer cloth picked up by the dairy inspector had been used and thrown into the drain to be washed away with other refuse and that this accounted for its foul condition. This witness further testified that the so-called garget on this cloth was not garget but particles of butter fat. The bad condition in which the milk reached the creamery on occasion was explained by calling attention to section 18 of the General Dairy Law of California (Stats.1923, pp. 849, 868, as amended by St.1927, p. 1640), in effect at the time in question here and which contained the following provision:

"All empty cans, bottles, vessels or other containers delivered to the producer by the manufacturer, retailer, or distributor for the reception of milk or any product of milk shall be kept by said producer in a clean, sanitary, sterile condition and shall be used for no other purpose whatsoever."

This witness also testified that the containers delivered by defendant to plaintiffs in which to transport the milk were not clean and sterile and that this condition caused the deterioration of the milk en route to the creamery; that on several occasions plaintiffs complained of this condition to defendant's officers without effect.

Another witness for plaintiffs explained the exclusion, from Los Angeles, of the

milk from plaintiffs' dairy by saying that it was a part of a quarantine against all milk produced in Kern county and was not particularly directed at plaintiffs; that this quarantine had been established because of the condition of some of the dairies of Kern county.

We have gone into considerable detail in outlining the evidence in order to show the irreconcilable conflicts in it. If defendant's evidence be accepted as true, it was not only justified in refusing to continue to accept plaintiffs' milk but displayed great patience and forbearance in receiving it as long as it did. If the condition of the dairy, the cows and the milk was as bad as described, defendant's due regard for the health and welfare of its customers might be open to question from the fact that it accepted the milk at all. On the other hand, if plaintiffs' evidence be believed the dairy was sanitary and in excellent condition, the herd healthy and the dairy of such classification that its milk should have been sold as grade A raw.

The trial judge accepted plaintiffs' evidence as true. All conflicts in the evidence are addressed to and are to be resolved by him. He found that plaintiffs had performed in accordance with the terms of the contract and were able to perform up to December 1, 1935, when they sold their herd and went out of the dairy business. We cannot disturb a finding or reverse a judgment merely because of conflicts in the evidence.

[4-7] Defendant seeks to escape the result of these rules by urging that the clause in the contract reading, "that the whole of said milk shall be produced from tuberculin tested cows under grade A inspection", means that the inspection must be made by state dairy inspectors who must find conditions justifying the production and sale of grade A raw milk; that no evidence other than that of such inspectors could be received to show the condition of the dairy, herd and milk; that in the absence of proof of fraud on the part of the state inspector, his action in degrading the dairy was final and conclusive and of itself established a breach of contract on the part of plaintiffs sufficient to justify defendant's refusal to continue to accept milk; that the trial court could accept no testimony of any other witness other than that of another state dairy inspector in contradiction of the evi-

dence of the inspector who degraded the dairy.

Defendant's contention that the contract provides for the production and sale of only grade A raw milk cannot be sustained. The contract does not so provide. Subdivision (a) of section 3 of the Pure Milk Law of California (Stats.1927, pp. 1944, 1947) established the grades of market milk in California among which is "grade A milk". Subdivision (d) of the same section defined grade A milk as both grade A raw and grade A pasteurized. At the time of the execution of the contract here in question the term "grade A milk" had a fixed statutory definition. When that term was used in the contract it must be held to have been used in the sense in which it was defined in the statute. As the statutory definition was clear, the contract contained no ambiguity that could be explained by parol. Therefore, as the contract did not provide that the milk produced must be subjected to classification as grade A raw we must reject the contention that the word raw should be read into it.

We must next turn to defendant's contention that the phrase "grade A inspection" must be construed to mean a grade A rating made by a state dairy inspector after he had made an inspection, and that no evidence other than that of a state inspector could be received to establish the grade of the milk produced at plaintiffs' dairy.

We need pay little attention to the evidence produced by defendant concerning the condition of the dairy prior to the inspection by the state dairy inspector on June 22, 1933, upon which defendant acted in the termination of the contract. If there were breaches of the contract by plaintiffs prior to that date those breaches were waived by defendant by its continuing to accept and pay for plaintiffs' milk at contract prices. *Boyles v. Kingsbaker*, 5 Cal.2d 68, 53 P.2d 141. If evidence of prior breaches has any value at all its force must be limited to corroboration of the evidence of the state inspector as to the conditions he found on June 22, 1933.

As we have seen, the term "grade A" as used in reference to milk has its meaning defined by statute and includes both "grade A raw" and "grade A pasteurized" milk. It is a classification of milk based upon its excellence and the condition of the dairy.

The terms "inspect" and "inspection" are in common use and have well defined and generally understood meanings. In *United States v. A. Bentley & Sons Co.*, D.C., 293 F. 229, at page 240, it is said:

"'To inspect' means to look; to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of the thing; to view and examine for the purpose of discovering and correcting errors. *People ex rel. Spire v. General Committee*, 25 App.Div. 339, 49 N.Y.S. 723, 728; *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 33, 25 S.Ct. 552, 49 L.Ed. 925."

In *Fidelity & Casualty Co. v. City of Seattle*, 16 Wash. 445, 47 P. 963, it was said (page 964):

"Inspection is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations. The definition cited from Webster by the appellant, namely, 'to look upon; to examine for the purpose of determining quality, and detecting what is wrong, and the like,' seems to us sufficient to show the failure of the contention, and we think the ordinarily accepted meaning of the word 'inspection' is fully as broad and comprehensive as the definition given by the lexicographer above." To the same effect are *Silfies v. Austin*, 104 Pa.Super. 344, 158 A. 661; *Sim v. State*, 142 Misc. 159, 254 N.Y.S. 150; *Texas & P. Ry. Co. v. Allen*, 5 Cir., 114 F. 177.

We are of the conclusion that the phrase "grade A inspection" was used in the contract to establish the standard or grade of milk to be delivered by plaintiffs to defendant and that this standard or grade might be proved by the evidence of a state inspector or that of any other qualified person. The contract does not require that the inspection be made exclusively by a state inspector, and in the absence of such provision it should follow that the quality of the milk and condition of the dairy might be proved by the testimony of any competent person. Further, defendant admits that proof of fraud on the part of a state dairy inspector in degrading a dairy would furnish reasons for a trial judge rejecting his evidence and listening to the testimony of other witnesses. This query arises, in view of the violent conflict in the evidence,—the testimony of the inspectors as to the deplorable conditions at the dairy and the testimony of others as

to the excellent conditions there,— is there not some evidence of fraud in the record? Fraud is seldom proved by direct affirmative testimony. Usually it must be established by circumstantial evidence.

[8,9] If we are in error in what we have just said, there is another controlling reason why we must approve the action of the trial court in accepting the testimony of witnesses other than state dairy inspectors as to the rating to which the dairy was entitled. If, as we have held, the word "inspection", as used in the contract, may be defined in its usual sense, and if, as defendant maintains, it can also be defined as meaning inspection by state dairy inspectors only, then there is an ambiguity in the contract that is subject to explanation and construction. It is well settled that where such an ambiguity exists in a contract, the question of its proper construction is first addressed to the trial judge, and if the conclusion reached by him is not unreasonable it will be supported on appeal. The trial judge having construed the contract in a sense favorable to plaintiffs, and as that construction is not unreasonable, we must accept it here.

[10] As the trial court found on sharply conflicting evidence that plaintiffs had performed under their contract, and that defendant had wrongfully refused to accept their milk, it follows that plaintiffs are entitled to recover proper damages. *Wood, Curtis & Co. v. Seurich*, 5 Cal.App. 252, 90 P. 51; *California Sugar & White Pine Agency v. Penoyar*, 167 Cal. 274, 139 P. 671.

This brings us to the question of the evidence of damage, the proper measure of damage, and whether plaintiffs can recover damages after December 1, 1935, when they sold their herd, to March 26, 1939, the end of the ten-year term.

Counsel for both parties argue that the amount of the damages awarded in the sum of \$10,158.24 is not supported by the evidence and is contrary to the evidence. The trial judge took the view that the proper measure of damage to be awarded was the difference between the cost of production and the minimum contractual selling price of seventy cents per pound of butter fat in the milk delivered. He fixed the cost of production at fifty-four cents per pound of butter fat and arrived at the amount of damages by multiplying by sixteen cents the total number of pounds of butter fat produced by plaintiffs between

the date of default and December 1, 1935, which he fixed at 63,489 pounds.

Counsel for defendant complain that the trial judge did not include in his estimate of the costs of production the value of the services of plaintiffs who devoted part, if not all, of their time to the dairy; the value of feed raised by plaintiffs on their own and another farm which was fed to the herd; rental value of the farm on which the herd was kept; interest on capital investment; other items not necessary to segregate. A study of the record leads us to the conclusion that some part, if not all, of these contentions are correct.

Plaintiffs contend that the evidence shows that they produced and could have delivered over 70,000 pounds of butter fat instead of the 63,489 pounds as found by the trial court. They also produced several tables in each of which they used a separate basis of figuring production costs and in none of them is the result reached of the cost of fifty-four cents per pound of butter fat. We are inclined to agree with plaintiffs on some of these contentions.

It follows that the award of damages in the sum of \$10,158.24 cannot be sustained. However, from the view we take of the case and of the rule governing the proper measure of damage to be applied here, we need spend no further time on these arguments of the parties.

The question of the proper rule of the measure of damage to be applied here presents some difficulties. Counsel agree on the rules of law governing the damages recoverable for breach, by the buyer, of a contract of sale of personal property, but cannot agree on the particular rule to be applied to the facts before us. It is admitted that where a contract for the sale of personal property not in being is breached by the buyer, the measure of damage is the difference between the cost of production and the contract price. It is also agreed that where a contract for the sale of personal property in the possession of the seller, title not having passed, is breached by the buyer, the seller may resell the property and recover the difference between the market price at the time of the sale and the contract price. Section 1784, Civ.Code; *Sobelman v. Maier*, 203 Cal. 1, 262 P. 1087; *Nye & Nisson v. Weed Lumber Co.*, 92 Cal.App. 598, 268 P. 659; *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 P. 177.

Defendant urges that the milk was not in being at the time of the breach of the contract; that it was not then in the possession of plaintiffs, the sellers; that it was produced daily thereafter; that therefore if plaintiffs can recover at all they can only recover the difference between the cost of production and the contract price. Plaintiffs reply that they were in possession of the cows that produced the milk; that the daily process of production was an automatic phenomenon of nature over which they had no control and with which they could not interfere; that the milk had a potential existence at the time of the breach; that the possession of the cows should be construed to be possession of the milk which they would produce in the future during the life of the contract. Both arguments are strongly presented and a choice between them is not a simple matter. We have been cited to no California case with parallel facts.

It is true that plaintiffs' cows were in their possession at the time of the breach of the contract by defendant. It is also true that those cows automatically produced milk daily and that plaintiffs could not stop its production unless they destroyed their herd. This they were under no obligation to do.

In 23 Ruling Case Law, pp. 1243-1245, we finding the following:

"A transmutation of title to the property sold is an essential element of a sale, as distinguished from an executory contract of sale, and therefore in order to make a complete sale of property whereby the title would pass from the seller to the buyer, it is necessary that the thing which is the subject of the sale should have an actual or potential existence at the date of the sale. On the other hand property may be the subject of a sale if it has a potential or possible existence, as the product or increase of that which is in existence, and the right to it when it shall come into existence is a present vested right. In such case, the sale is absolute and perfect when made, vesting the property in the purchaser the moment it comes into existence. In all such cases, the thing sold has a potential existence, and the hopes or expectations of means founded on a right in esse is the object of sale. * * * Things have a potential existence which are the natural product or the expected increase of something already belonging to the seller. * * * Likewise milk and butter, the ex-

pected products of a dairy to be produced in future from cows then in the hands of the seller, have such a potential existence that they may be lawfully sold, and the sale will vest the products in the purchaser the moment they come into existence."

In *Arques v. Wasson*, 51 Cal. 620, 21 Am.Rep. 718, by way of dicta, it was said:

"It is conceded by counsel that if the thing has a potential existence, as, for example, wool to be grown from sheep then belonging to the mortgagor, or butter to be thereafter produced from his cows, or a crop arising from seed already sown, the mortgage would be valid. The general rule undoubtedly is that a person cannot convey a thing not in esse, or in which he has no present interest. But is it quite as well settled, that if the thing has a potential existence it may be mortgaged or hypothecated. 'If one, being a person, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise, for the tithes are potentially in the person. * * * So one may grant all the wool of his sheep for seven years; but not of the sheep which he shall thereafter purchase.' (*Van Hoozer v. Corey*, 34 Barb. [N.Y., 9], 12, and authorities there cited.)"

The case of *Cutting Packing Co. v. Packers' Exchange of California*, 86 Cal. 574, 25 P. 52, 10 L.R.A. 369, 21 Am.St. Rep. 63, by analogy, is strong authority supporting the position of plaintiffs. In that case Wm. C. Blackwood sold to the Cutting Packing Company the crops of apricots to be grown on his trees during the five years following 1881. The purchaser assigned its contract to The Packers' Exchange of California which without cause defaulted on its contract and refused to accept the fruit. The Cutting Packing Company took the fruit for which it paid the contract price. It resold the fruit on the open market at a loss and sued The Packers' Exchange of California for the difference between the contract price and the selling price. In affirming the judgment for the Cutting Packing Company the Supreme Court said (page 54):

"It is clear that a breach of the implied contract, thus created, between the parties here, was made when the defendant refused to accept and pay for the crop of 1884; and the plaintiff, upon the breach being so made, having stepped in and received and paid for the crop pursuant to the original contract, as it was obliged to

do, thereby acquired the right to recover as damages, from the defendant, the difference between the price paid under the contract to Blackwood and that realized from the sale of the fruit in open market at current rates."

In the case of *Central Oil Co. v. Southern Refining Co.*, supra, the plaintiff sold to defendant a minimum number of barrels of oil which were to be produced from its well. The defendant wrongfully breached the contract and plaintiff resold the oil at the market price and recovered judgment for the difference between the market price and the contract price. The Supreme Court held this to be the proper measure of damages. See, also, *Nye & Nisson v. Weed Lumber Co.*, supra; *Miller v. Robertson*, 266 U.S. 243, 45 S.Ct. 73, 69 L.Ed. 265. The decision in the *Central Oil Company Case* becomes more persuasive when we remember that when the contract was made the oil was not personal but real property, for oil in place is a part of the fee and only becomes personal property when it is recovered on the surface. *Stone v. City of Los Angeles*, 114 Cal.App. 192, 299 P. 838. See, also, *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. Therefore, when the contract was made the oil had only a potential existence as personal property, in which form it was sold.

[11] We therefore conclude that the milk from the cows in the possession of plaintiffs at the time of the breach of the contract by defendant had sufficient potential existence to enable plaintiffs to invoke the rule of damages governing breach of a contract for the sale of a product in being and in possession of the seller at the time of the breach, which rule permits the seller to sell the article on the open market and to recover as damages the difference between the contract price and the selling price obtained on the open market. Milk prices were greatly depressed after the contract was executed. This would probably entitle plaintiffs to recover a greater sum than that awarded in the court below.

[12-14] Plaintiffs next contend that the trial court erred in not allowing them prospective damages from the time they sold their herd on December 1, 1935, to the end of the term of the contract on March 26, 1939. This question may be thus stated: Can plaintiffs recover after voluntarily putting it out of their power to perform un-

der the contract? On this question the trial court found:

"That on the day prior to the commencement of the trial of this action plaintiffs ceased producing milk from their dairy ranches and therefore were unable to deliver milk under said contract, and that plaintiffs are not entitled to recover damages under said contract after they ceased producing."

In support of their contention that they should have been awarded prospective damages to the end of the contract period, plaintiffs cite 22 Cal.Jur. 1053, 1054; *Hale v. Trout*, 35 Cal. 229; and *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55.

In 22 California Jurisprudence, at page 1054, we find the following:

"In the case of a contract, which requires periodical deliveries or delivery by instalments—the transaction being single or indivisible—the buyer's breach absolves the seller of any obligation in respect of future deliveries, and hence the buyer cannot defend upon the ground that the seller incapacitated himself to perform in future."

The only case cited in support of the text is *Ahlers v. Smiley*, 163 Cal. 200, 124 P. 827. While there may be dicta in the opinion supporting the text, the question we are considering was not before the court for decision. It appears on page 204 of the opinion, 124 P. 827, that no damages were awarded the sellers after they had disposed of their plant and thus put it out of their power to perform.

In *Hale v. Trout*, supra, the plaintiffs had erected a saw-mill for the manufacture of lumber which defendants had agreed to purchase. Defendants wrongfully breached the contract and refused to accept future deliveries of lumber during the balance of the term of the contract. The Supreme Court was of the opinion that plaintiffs were not compelled to continue manufacturing lumber and thus to at all times keep themselves in readiness to perform their obligations under the contract in order to enable them to recover prospective profits after the breach by defendants. The *Hale Case* differs factually from the instant case in this important particular: in the *Hale Case* the plaintiffs did not dispose of their saw-mill and thereby reduce their capital investment to cash, while in the instant case the dairy was sold by the O'Hare brothers, who presumably received its full

market value in cash, which they were then free to use and enjoy in other business ventures or from which interest could have been received. The decision in the Hale Case, when compared with the facts of the instant case, goes no farther than holding that the Hale brothers were not required to keep steam in their boilers and a crew of men at their saw-mill engaged in the manufacture of lumber after the buyers had refused to accept deliveries of lumber.

The sole question decided in the Los Angeles Gas & Electric Company Case was that the contract for the sale of oil over a period of years was entire and indivisible and not severable. The question we are now considering was not before the court.

It must be admitted that the contract we have before us was entire and indivisible and was not a severable contract. *Karales v. Los Angeles Creamery Co.*, 36 Cal.App. 171, 171 P. 821; *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, *supra*. It also must be admitted that it is generally held that where the buyer breaches such a contract the seller, not being at fault, may recover damages in such an amount as would compensate him for all the detriment caused by the breach (section 3300, Civ. Code) that the seller need not keep himself in a position to perform after the breach; that prospective loss to the end of the term of the contract may be compensated in damages. These rules are applied subject to the rule that the prospective damages be capable of sufficiently accurate computation so as not to violate the rule against uncertain and speculative damages.

In all the cases to which we have been cited in which the rule has been applied that the seller need not keep himself in a position to perform, the seller retained ownership of the means of manufacture or production. In the instant case we have the unusual situation of the sellers disposing of the means of production and changing the form of their capital investment by reducing it to cash. They not only put themselves in a position where they were not able to perform but received the immediate benefit of the use of their entire capital investment.

We take it that had all of plaintiffs' cattle become suddenly infected with tuberculosis after defendant breached the contract, plaintiffs would have suffered no further damage from the breach. The contract did not require defendant to accept milk from

tubercular cows and plaintiffs would have had no milk to sell and consequently could have suffered no further damage from the refusal to accept that which they could not deliver. The situation presented by the sale of the herd does not differ in principle from the situation which we have assumed. After the sale of the herd plaintiffs had no milk to deliver and suffered no prospective damage. They could not buy milk from others to deliver to defendant because the contract only required defendant to buy "all milk produced upon and from the dairy ranches" of plaintiffs. When plaintiffs went out of the dairy business on December 1, 1935, they could suffer no prospective damage because defendant was not compelled by the contract to accept anything which they had for sale.

There should be some analogy between the facts before us and the rule announced in section 460, at page 859, Restatement of the Law, Contracts:

"Where the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of both parties necessary for the performance of a promise in the bargain, a duty to perform the promise. * * *

"(b) is discharged if the thing or person subsequently is not in existence in time for seasonable performance, unless a contrary intention is manifested, or the contributing fault of the promisor causes the nonexistence." See, also, *Williams v. Miller*, 68 Cal. 290, 9 P. 166; *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458, L.R.A.1916F, 1.

In the instant case the defendant did not agree to buy any definite number of gallons of milk, but only the milk produced on plaintiffs' farms. After the sale of the dairy herds there was no milk produced on those farms and there was nothing left that defendant had agreed to buy. Plaintiffs had voluntarily disposed of their dairy herd and had gone out of the milk producing business on December 1, 1935. Defendant was not obligated to accept milk produced elsewhere than on the farms of plaintiffs. Plaintiffs voluntarily changed their capital investment from cows to money. Apparently they preferred to receive the income from the money rather than to rely on a prospective profit from the cows. They could no longer perform under their contract as they produced no milk for sale. Their prospective damage could not be fixed with any degree of exactness because

they had by the sale of their cows removed the only possible basis upon which future damages could be computed.

The judgment is reversed and the cause is remanded for new trial solely on the issue of the amount of damages, with direction to the trial court to retry the issue of the amount of damages only; to amend its findings of fact and conclusions of law in accordance with the evidence so taken and the views herein expressed, and to render judgment in favor of plaintiffs for the amount of damages so found upon a determination of that issue.

We concur: BARNARD, P. J.; JENNINGS, J.



26 Cal.App.2d 753

James H. O'HARE and Peter C. O'Hare, as Copartners Doing Business under the Firm Name and Style of O'Hare Bros., Plaintiffs and Appellants, v. PEACOCK DAIRIES, Inc. (a Corporation), Defendant and Respondent.

Civ. 1842.

District Court of Appeal, Fourth District, California.

May 14, 1938.

Rehearing Denied June 13, 1938.

Hearing Denied by Supreme Court
July 12, 1938.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Joseph Scott, of Los Angeles, and Claflin & Dorsey, of Bakersfield, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal by plaintiffs from that portion of a judgment which fixed their damages for breach of contract at the sum of \$10,158.24. The questions of the amount of damages awarded, the proper measure of damages and prospective damages are involved here.

This appeal is from a judgment which is the same as that involved in the case of O'Hare et al. v. Peacock Dairies, Inc., Cal.App., 79 P.2d 433, the opinion in which cause has been filed this day. The

two appeals are separate and have their own briefs and records. The questions presented on this appeal have all been considered and decided in that case and furnish our reasons and authorities for the decision of this appeal.

The judgment is reversed and the cause is remanded for new trial solely upon the issue of the amount of damages, with directions to the trial court to retry the issue of the amount of damages only; to amend its findings of fact and conclusions of law in accordance with the evidence so taken and the views expressed herein, and to render judgment in favor of plaintiffs for the amount of damages so found upon a determination of that issue.

We concur: BARNARD, P. J.; JENNINGS, J.



26 Cal.App.2d 371

In re HASELBUD'S ESTATE.

HASELBUD v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 2220.

District Court of Appeal, Fourth District, California.

May 17, 1938.

Hearing Denied July 15, 1938.

1. Statutes $\hookrightarrow$ 225

The statute pertaining to payment of testator's debts, etc., where testator provides therefor in will, and statute providing that, if a testator marries after making will, will is revoked, both of which constitute part of the Probate Code, should be construed together and with reference to antecedent legislation on the same subjects in determining payment of testator's debts where surviving spouse renounced the will. Probate Code, §§ 70, 750.

2. Wills $\hookrightarrow$ 191

As respects revocation of will by marriage, it is the policy of the law that wife and children must be provided for.

3. Wills $\hookrightarrow$ 191

The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause

him to destroy or cancel a previous will, and does not admit of evidence to the contrary unless provision has been made according to law for wife and children who have survived him. Probate Code, § 70.

4. Wills ⚭191

The provision of the Probate Code that the marriage of a testator revokes a previously made will, which consolidated two earlier statutes, did not abridge the previously existing law respecting the rights of a surviving spouse by inserting the words "as to the spouse," but was intended to preserve the dispositions of the testator in favor of beneficiaries under the will in so far as consistent with rights of the surviving spouse. Probate Code, § 70.

5. Wills ⚭191

Where testator bequeathed entire estate to sister and thereafter married, the will was invalid as respected widow's property rights, so that her share of the property did not come within statute providing for order to resort to assets of testator's estate for payment of debts, etc. Probate Code, §§ 70, 750.

6. Wills ⚭832

Where testator bequeathed entire estate to sister and married after making will, surviving widow's share in the estate was not chargeable with all of the liabilities of the estate. Probate Code, §§ 70, 300, 750.

7. Wills ⚭832

Where testator bequeathed entire estate to sister, then subsequently married, fact that surviving widow had absorbed larger part of the estate through the family allowance granted her did not affect construction of provisions of Probate Code that widow's share in testator's estate was not chargeable with all of estate's liabilities. Probate Code, §§ 70, 300, 750.

8. Husband and wife ⚭273(4)

Where testator bequeathed entire estate to sister, then subsequently married, and origin of debts of testator was not shown, separate property of testator could not be exonerated from bearing at least its pro rata share both of the debts and of the expenses of administration. Probate Code, §§ 70, 300, 750.

9. Husband and wife ⚭273(4)

Where the expenses of administration are of a general nature, they should be charged pro rata on the community property and separate estate.

10. Husband and wife ⚭273(4)

Where testator bequeathed entire estate to sister and then subsequently married, family allowance which was granted to widow after testator's decease was not primarily chargeable to community property, since the right to a family allowance is statutory and there is no statute to that effect.

11. Husband and wife ⚭273(4)

Where testator bequeathed entire estate to sister and then subsequently married, testator's separate property was not required to be resorted to first for payment of family allowance and expenses of administration, but community property was required to share pro tanto in the payment. Probate Code, §§ 70, 202, 300, 750.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Ivan B. Haselbud, deceased, by Anna N. Haselbud against the Bank of America National Trust & Savings Association, a national banking association, as executor of the last will and testament of Ivan B. Haselbud, deceased, and Lois Fay Haselbud Morris, wherein plaintiff, widow of deceased, claimed the right to all the community property and one-half of the separate property after a pro rata deduction of debts, family allowance, and expenses of administration of deceased's estate. From a judgment adverse to plaintiff, plaintiff appeals.

Reversed and remanded.

Irvine P. Aten and Richard V. Aten, both of Fresno, for appellant.

Chester R. Andrews and John J. Gallagher, both of Fresno, for respondent Lois Fay Haselbud Morris.

Harvey, Johnston & Baker, of Bakersfield, for respondent Bank of America Nat. Trust & Savings Ass'n.

HAINES, Justice pro tem.

Ivan B. Haselbud, a resident of Fresno county on December 12, 1922, being then unmarried, made a will devising and bequeathing his whole estate to the Security Trust Company of Bakersfield to be held in trust for his sister, respondent Lois Fay Haselbud Morris, for a period of ten years or such part thereof as she should live, the trust at the end of such time to terminate and the corpus of the prop-

erty to be turned over to such sister, if still living, otherwise to the decedent's nieces and nephews then living. On September 12, 1931, Haselbud was married to appellant Anna N. Haselbud and thereafter on October 2, 1934, died without issue, leaving surviving him his mother and his widow, the said Anna N. Haselbud, as well as his sister, the said Lois Fay Haselbud Morris. Thereupon decedent's will was admitted to probate and Bank of America National Trust and Savings Association (apparently the successor of said Security Trust Company) appointed executor thereof. It in due time filed its final account and petition for distribution, in connection with which appearances were made and objections filed both by respondent Lois Fay Haselbud Morris and appellant Anna N. Haselbud. The gross estate accounted for amounted in value to \$7,194.76, consisting of community property of the value of \$1,770.26 and separate property valued at \$5,424.50. The aggregate of debts of the decedent, family allowance, and expenses of administration, was found to be \$5,138.09, leaving for distribution, property worth \$2,055.67. The widow claimed the right to all the community property and one-half of the separate property after a pro rata deduction of these charges. The sister claimed that the debts, family allowance and expenses of administration should be charged to the widow's share so far as that would go, so as, to that extent, to exonerate the property passing under the will. The court adopted that view, the effect of which was to leave no net estate, distributable to the widow. The latter appeals.

The appeal presents two questions for solution, that is:

First—Where a will is revoked by a subsequent marriage as to the surviving spouse, under section 70 of the Probate Code, are the debts, family allowance and expenses of administration to be borne ratably by the portion of the estate vesting in the surviving spouse and the portion passing under the will, or must the portion passing under the will be, so far as possible, exonerated under the provisions of section 750 of the Probate Code?

Second—Are debts, family allowance, and expenses of administration to be borne ratably by the community and separate property of the decedent or is the one or the other to be first charged with the same?

Section 750 of the Probate Code provides that: "If the testator makes provision by

his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

Section 70 of the same code is as follows: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

[1] While each of these sections constitutes a revision of earlier legislation, both were coincidentally enacted in their present form, as part of the Probate Code, and it is the duty of the courts to construe them together, as well as with reference to the antecedent legislation on the same subjects. Section 70 is a substitute for the former sections 1299 and 1300 of the Civil Code which read respectively as follows:

"§ 1299. Effect of marriage of a man on his will.

"If after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

"1300. Effect of marriage of woman on her will.

"If, after making a will, the testatrix marries, and the husband survives the testatrix, the will is revoked, unless provision has been made for him by marriage

contract, or unless he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

[2, 3] The Supreme Court said in *Sanders v. Simcich*, 65 Cal. 50, 52, 2 P. 741, 742: "It is the policy of the law that wife and children must be provided for. Therefore the Civil Code declares that where an unmarried person has made a will and afterwards marries, the marriage, whether followed by the birth of issue or not, operates in case of the survival of wife or children, if any, as a revocation of the will, unless some specific provision has been made by the will itself or by a marriage contract, for the surviving wife, or by some settlement or provision for any surviving children of the marriage. Sections 1298, 1299, supra. The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will; and does not admit of evidence to the contrary unless provision has been made according to law for wife and children who have survived him. [Secs. 1298, 1299, supra.]"

[4, 5] It may be true, as respondents assert, that this expression in *Sanders v. Simcich*, supra, as originally uttered, was dictum. Nevertheless, it has been so often quoted and approved in the subsequent cases (*Estate of Ryan*, 191 Cal. 307, 216 P. 366; *Estate of Meyer*, 44 Cal.App. 289, 186 P. 393; *Estate of Rozen-Goldenberg*, 1 Cal. App.2d 631, 37 P.2d 132) that we think we may safely treat it as a construction of the policy underlying the original legislation of which section 70 of the Probate Code is but a reiteration. We have no reason to believe that by consolidating the former substance of sections 1299 and 1300 of the Civil Code in the present section 70 of the Probate Code and by inserting in the latter the words "as to the spouse," in the provision respecting the revocation of a will by marriage, the legislature intended in any way to abridge the previously existing law respecting the rights of a surviving spouse. We think it much more natural to assume a continuity of policy, so far as a surviving spouse is concerned, and to construe the limitation on the provision for a revocation of a will by a subsequent marriage, made by the words "as to the spouse," not as intended to effect any such abridgment

of what under the former statutes would have been the rights of such spouse, but rather as intended merely to preserve the dispositions of the testator in favor of the beneficiaries under the will in so far as consistent with such rights of the surviving spouse. In so far as it affects Mrs. Haselbud's property rights the decedent's will is, by the express provision of section 70 of the Probate Code, no will at all, but is as to her revoked and eliminated from the situation. To say that, although so revoked, it is still effectual to bring her share of the property within the scope of section 750 of the same code would be a contradiction in terms.

It is urged on respondents' behalf that section 300 of the Probate Code provides that all of the decedent's property shall be chargeable with the expenses of administration of his estate and the payment of his debts and the allowance to the family "*except as otherwise provided in this code*," and that section 754 provides that in selling property to pay debts, legacies, family allowance or expenses, there shall be no priority as between personal and real property, but that a sale therefor may at the discretion of the executor or administrator be made of either, "*except as provided by sections 750 and 751 of this code*," and that the effect of these enactments, and particularly of the italicized exceptions, is unequivocally to subject *all* property left by the decedent to the provisions of section 750 for first charging the debts, family allowance and expenses of administration to the portion of the estate not disposed of by will. That might be true if, so far as the surviving spouse were concerned, there were any will but, the will having, as to her, been revoked, has not, so far as her right to her share of the property is concerned, any continued existence at all, and therefore cannot, as to it, have any effect at all.

We find nothing in *Estate of Traver*, 145 Cal. 508, 78 P. 1058; *Estate of Hall*, 183 Cal. 61, 190 P. 364; or *Estate of Kelleher*, 205 Cal. 757, 272 P. 1060, cited for respondent, that militates against this view. In each of these cases there was a will, good as against all the world, which, however, for one reason or another failed effectually to dispose of some part of the decedent's estate. In each of these cases, accordingly, it was held that the statute required the charges against the estate to be deducted from the portion not disposed of. The dif-

ference between these cases and the one before us is the same already emphasized; that here, so far as appellant is concerned, there is no will. Counsel for respondent quotes and asks us to apply in the instant case the following language from *Estate of Hall*, supra (page 365).

"The fallacy in the position of appellant arises from a failure to distinguish between the distribution of the property in accordance with the terms of the will and the payment of debts as provided by law. The court first determines the rights of the parties under the will, and then applies the law with relation to the payment of indebtedness."

[6] Merely to quote this language is to demonstrate its inapplicability here. So far as appellant is concerned, there can be no "distribution of the property in accordance with the terms of the will," nor can the court "first determine the rights of the parties under the will" in any such way as to at all affect her. Therefore, when the court here proceeds to "apply the law with relation to the payment of indebtedness," it manifestly must do so without reference to the determination of any rights under the will. Under section 300 of the Probate Code all of the decedent's property is made chargeable with debts, family allowance and expenses of administration "except as otherwise provided in this code." The only exception relied on by respondent is that conceived to exist under the provisions of section 750. In our opinion the controlling effect of section 70 makes that exception inapplicable as against appellant. We therefore hold, so far as this estate is concerned, that the applicability of section 300 is not affected by the section (750) relied on, and that the trial court was in error in charging all of the liabilities of the estate against appellant's share in it.

[7] Complaint is made that this construction unduly favors the surviving spouse and that in this case she has already absorbed the larger part of the estate through the family allowance granted her. That this may have been true in this particular case does not affect the situation. The same complaint might have been made if the former section 1299 of the Civil Code had remained in force and not given place to section 70 of the Probate Code, yet the possibility of a family allowance in no way affected the operation of this former statute. No more do we have any reason for

believing that the legislature intended it to affect the operation of the present section 70.

[8-10] We have yet to consider the other question raised on the present appeal: that is, whether the debts, family allowance and expenses of administration are equally chargeable to the community property and the decedent's separate property, or contrariwise, one or the other is primarily chargeable with them. It does not appear from the record before us what was the origin of the debts of the deceased, which as has been noticed, constitute part of the obligations of the estate. This being so, we are aware of no argument that can be made for exonerating the separate property of the deceased from bearing at least its pro rata share both of these and of the expenses of administration. It is laid down in 24 C.J. 459 (citing *In re Patton's Estate*, Myr.Prob. 241) that "Where the expenses of administration are of a general nature, they should be charged pro rata on the community property and separate estate * * *." It is claimed, however, as has just been noticed, that in this instance the greater part of the charges against the estate represent family allowance and that since, during the lifetime of the deceased, expenditures for family support were primarily chargeable to community property (*Estate of Cudworth*, 133 Cal. 462, 468, 65 P. 1041; *Estate of Granniss*, 142 Cal. 1, 6, 75 P. 324; *Thompson v. Davis*, 172 Cal. 491, 495, 157 P. 595; *Van Camp v. Van Camp*, 53 Cal.App. 17, 25, 199 P. 885; *Estate of Tompkins*, 123 Cal.App. 670, 675, 11 P.2d 886; *Cline v. Cline*, 4 Cal.App.2d 626, 629, 41 P.2d 588; *Conard v. Conard*, 5 Cal.App.2d 91, 92, 41 P.2d 968) the same rule ought to apply after the husband's death and pending the administration of the estate. The answer is, however, that there is no statute to that effect, and since the right to a family allowance is statutory, we would, in order to announce such a rule, have to read it into the statute. We do not think this would be warranted.

[11] It remains to inquire whether, conversely, all of the debts, family allowances and costs of administration ought to be charged to the decedent's separate property so far as that will suffice to pay them in order, so far forth, to exempt the community property from their payment. There can, of course, be no question that the community property is liable for each and all of those obligations, for section 202

of the Probate Code expressly so declares. The question, then, is merely, as between the community property and the separate property of the deceased husband, whether such separate property should first be resorted to. We can see no reasonable ground for contending for any such rule insofar as the family allowance and expenses of administration are concerned since, at least where, as here, the family allowance inures solely to the benefit of the surviving widow, no equitable reason can possibly exist for exempting the community property from its payment. Moreover, since the expenses of administration are as much incurred in caring for the community property as in caring for the husband's separate property there is clearly no argument for exonerating the community property from sharing pro tanto in their payment.

The only phase of the subject that gives us any pause is the question whether the amendment in 1927 (page 484) of section 161a of the Civil Code, declaring the interests of the spouses, while living, in the community property to be "present, existing and equal interests," though under the husband's control, invests a surviving wife with any right, which the probate court ought, in the exercise of its equitable powers, to recognize, to have such debts of the husband as may be found not to have been incurred on behalf of the community charged primarily to his separate property. In this connection it is said in 3 California Jurisprudence Supplement, pp. 688, 689:

"In the administration of the estate of the husband, the courts of California have not made any distinction between the debts of the husband with respect to his separate property and the debts incurred in managing the community property, nor have there been any rules established requiring either separate or community property to be resorted to for the payment of debts."

The text-writer subjoins in a note this query:

"If, for example, the administrator pays the debts with the community funds, should not the surviving wife be entitled to question his account and petition for distribution and require a due proportion of the amount paid to be charged against his separate estate?"

In the instant case, however, as already noted, the record does not inform us of the nature or origin of the debts proved against the estate. If they are debts incurred in

behalf of the community manifestly the community ought to contribute toward their payment. It will be time enough to decide what ought to be the rule with respect to debts incurred by the husband before marriage or on his separate account when a case is presented which clearly involves them.

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 384

In the Matter of the Estate of Ivan B. HASELBUD, sometimes known as I. B. Haselbud, and sometimes known as I. B. Hazelbud, Deceased.

HARVEY & JOHNSTON, Appellants, v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION (a National Banking Association), as Executor of the Last Will and Testament of Ivan B. Haselbud, Deceased; Lois Fay Haselbud Morris and Anna N. Haselbud, Respondents.

Civ. 2220.

District Court of Appeal, Fourth District, California.

May 17, 1938.

Hearing Denied by Supreme Court
July 15, 1938.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Harvey & Johnston, of Bakersfield, for appellants.

Chester R. Andrews and John J. Gallagher, both of Fresno, for respondent Lois Fay Haselbud Morris.

Irvine P. Aten and Richard V. Aten, both of Fresno, for respondent Anna N. Haselbud.

HAINES, Justice pro tem.

This is an appeal by the law firm of Harvey & Johnston from so much of the order and decree of the superior court of Fresno county settling the final account of the executor in the above entitled estate and making distribution of said estate as fixes

the compensation allowed for extraordinary services of the attorneys for the executor at the sum of \$250. Although the appeal was separately taken from the appeal of Anna N. Haselbud, In re Haselbud's Estate, Cal.App., 79 P.2d 443, this day decided, from the same order and decree, it was presented upon the same transcript and has been assigned the same number. There is in the file, however, a communication from the said firm of Harvey & Johnston stating that they have stipulated with opposing counsel by a stipulation filed with the superior court that the said appeal of said Harvey & Johnston be dismissed.

The appeal is accordingly hereby dismissed.

We concur: BARNARD, P. J.;
MARKS, J.



26 Cal.App.2d 421

ZELLER v. REID et al.
Civ. 1897.

District Court of Appeal, Fourth District,
California.

May 18, 1938.

1. Death ☞85, 88, 89

In action for death by wrongful act, damages are limited to the pecuniary loss suffered by plaintiff, and no award can be made for grief or wounded feelings, but damages may include a pecuniary loss arising from the deprivation of the society, comfort and protection of the decedent. Code Civ.Proc. §§ 376, 377.

2. Death ☞97

In death action, the trier of fact has primary duty to fix amount of reasonable damages. Code Civ.Proc. §§ 376, 377.

3. New trial ☞9

The granting of new trial on issue of damages only in response to plaintiff's motion for new trial on all statutory grounds, because of insufficiency of evidence to sustain a verdict of \$1,000 for death of son from whom mother had never received any-

thing for support and whom mother had seen only three or four times, during ten years preceding son's death, was authorized as against defendants' contention that verdict should be permitted to stand as an award of nominal damages, or verdict be set aside as a whole on ground that it was the result of a compromise. Code Civ.Proc. §§ 376, 377.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Myrtle Zeller against G. W. Reid, A. W. Anderson, Ralph Anderson, Kenneth Anderson, and others for death of plaintiff's son resulting from an automobile accident. From an order granting a motion for new trial on the question of damages only, the named defendants appeal.

Affirmed.

Bradley & Bradley, of Visalia, and Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Halbert & Stone, of Porterville, for respondent.

MARKS, Justice.

This is an appeal from an order granting a motion for new trial on the question of damages only. In this opinion we will refer to the respondent as the plaintiff, and to the appellants as the defendants.

Plaintiff was the mother of Harold William Lamb, who died on November 11, 1934, as the result of an automobile accident which happened on November 9, 1934. At the time of his death Harold was over the age of eighteen years.

In 1923 plaintiff was the wife of Arthur O. Lamb. The couple resided in Pleasantville, Ohio, with their four minor children, one of whom was Harold. Arthur O. Lamb died in 1923. Plaintiff remarried in 1930, and, with her husband, continued to reside in Pleasantville, Ohio, until the trial of this action.

In 1924, Clarence R. Lamb, brother of Arthur O. Lamb, with the consent of plaintiff, brought Harold and his brother Richard Henry Lamb to live with him in Tulare county, California. The two boys continued to reside with their uncle up to the time of the death of Harold.

Under date of August 30, 1928, Clarence R. Lamb and plaintiff entered into a writ-

ten contract wherein it was agreed that the two boys should continue to live with their uncle until each had reached his majority; that the uncle, Clarence R. Lamb, should, at his own expense, provide them with a home, support, maintenance and education; that he should be entitled to their services. He further agreed to make certain payments for the benefit of plaintiff and the four children. These need not be detailed here.

During the time elapsing between the date of the written contract and Harold's death he and his mother had exchanged visits three or four times. It is admitted that Harold had not contributed anything toward the support of his mother.

After the accident Harold was taken to a hospital, where he was given surgical, medical and hospital attendance, and where he died. Clarence R. Lamb paid all the hospital, nursing and medical bills as well as the funeral expenses for Harold. At the time of the trial he had not paid the doctors' bills of \$500 for the care of Harold's injuries following the accident. The bills were rendered to him.

It must be admitted that under the contract between plaintiff and Clarence R. Lamb the latter was liable for all the expenses of Harold resulting from the accident. It is also clear that he was entitled to the services and earnings of Harold during his minority. By the contract plaintiff surrendered to Clarence R. Lamb her custody and control of Harold and Richard and her right to the benefit of their services in consideration of Clarence's support and maintenance of Harold and his brother and the making of certain payments to her or for her benefit.

At the conclusion of the trial the jury returned a verdict in plaintiff's favor for \$1,000. In announcing the verdict the foreman added the following: "With the understanding that Five Hundred Dollars (\$500.00) of this was to go for the doctor bills." It does not appear that this was a part of the formal verdict.

Plaintiff moved for a new trial on all statutory grounds. The trial judge made the following order:

"Plaintiff's motion for a new trial in this action having been heretofore submitted to the court for consideration and decision, and the court, having duly considered the law and being fully advised in the prem-

ises, orders that said motion for a new trial be and the same is hereby granted as to the issues and adequacy of damages only, on the grounds of the insufficiency of the evidence to sustain the verdict rendered herein."

Defendants admit that if plaintiff is entitled to recover at all she is entitled to nominal damages for the death of her son. They argue that the verdict for \$1,000 must be construed to be nominal damages and should have been allowed to stand. As an alternative they argue that the verdict for \$1,000 indicates a compromise on the part of some jurors wherein there was no agreement on the question of negligence of defendants and contributory negligence of Harold, under which circumstances the new trial should have been granted generally, if at all, and not as to damages only.

[1] This action was brought under the authority of section 376 of the Code of Civil Procedure. In such a case "such damages may be given as under all the circumstances of the case, may be just." Section 377, Code Civ.Proc. Such damages are limited to the pecuniary loss suffered by the plaintiff. No award can be made for grief or wounded feelings but may include "a pecuniary loss arising from the deprivation of the 'society, comfort, and protection' of the decedent." *Griffey v. Pacific Electric Ry. Co.*, 58 Cal.App. 509, 209 P. 45, 49. See, also, *Bond v. United Railroads of San Francisco*, 159 Cal. 270, 113 P. 366, 48 L.R.A., N.S., 687, Ann. Cas.1912C, 50; *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, 213 P. 494; *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; *Ure v. Maggio Bros. Co., Inc.*, Cal.App., 75 P.2d 534. In *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 P. 183, it was said (page 185):

"But, in fixing the amount, the jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence."

[2] When we compare the amount of the recovery in this case with the pecuniary loss suffered and proved by plaintiff, we cannot regard the award of \$1,000 as only nominal damages. Under the evidence it is a very substantial award. The plaintiff had received nothing from the

earnings of her son and there is nothing in the evidence to indicate that she had any reasonable ground for expecting any financial assistance from him. Their contacts in the ten years preceding his death had been confined to correspondence and three or four visits. While the trier of fact is vested with the primary duty of fixing the amount of damages that would be reasonable, it is obvious that a large award could not be supported by the evidence before us.

[3] Defendants argue that as the trial judge granted a new trial "as to the issues and adequacy of damages only, on the grounds of the insufficiency of the evidence to sustain the verdict rendered herein", we must conclude that he regarded the award inadequate. It is not necessary to put any such construction on the order. It is just as reasonable to conclude from the language used in the order and from the facts of the case, that the trial judge regarded the judgment as excessive and coming within the rule announced in the case of *Cossi v. Southern Pacific Co.*, 110 Cal.App. 110, 293 P. 663, where a verdict of \$1 for the death of a minor son was sustained, where it was proved that the plaintiff had been separated from the son for a considerable time and had only seen him once during the separation.

We can find nothing in the evidence that would force the conclusion that the verdict in this case was the result of a compromise on the part of the jurors or indicating that some of them had surrendered their views on the questions of the negligence of defendants and the contributory negligence of Harold merely for the purpose of bringing in a small verdict under the rules announced in *Donnatin v. Union Hardware & Metal Co.*, 38 Cal. App. 8, 175 P. 26, 177 P. 845, *Bencich v. Market Street Ry. Co.*, 20 Cal.App.2d 518, 67 P.2d 398, and *Wallace v. Miller*, Cal.App., 78 P.2d 745. Rather it falls within the rule adhered to in *Tripceovich v. Compton*, Cal.App., 77 P.2d 286. The two lines of decisions are not conflicting and can be readily harmonized. See *Wallace v. Miller*, supra. Under the rule of the *Tripceovich* Case the trial judge exercised a reasonable discretion in granting a new trial on the question of damages only.

The order is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

26 Cal.App.2d 362
In re REID'S ESTATE.
Civ. 5989.

District Court of Appeal, Third District,
California.
May 16, 1938.

1. Homestead ⇨150(1)

Evidence held to justify decree setting apart to surviving widow homestead in property acquired by deceased by contract to purchase from father on ground that land was community and that brothers and sisters had waived interest acquired by inheritance from father's widow. Probate Code, § 661; Civ.Code, §§ 164, 687.

2. Husband and wife ⇨262(1)

All property which is acquired during the marriage except that which is obtained by gift, bequest, devise or descent, is presumed to be community property. Civ.Code, §§ 164, 687.

3. Husband and wife ⇨249

In determining whether property acquired by a husband is separate or community in its nature, the equitable status of the purchaser's title rather than the mere technical means by which the legal title is vested must control. Civ.Code, §§ 164, 687.

4. Homestead ⇨151

Title to land acquired by husband under contract of purchase from father vested in husband so as to constitute community property on which a probate homestead could be vested in the widow free and clear of the vendor's lien to enforce the payment of the balance of the purchase price thereof. Probate Code, § 661; Civ.Code, §§ 164, 687.

5. Conversion ⇨11

Where contract for sale of realty which is binding on the parties is executed, an equitable conversion is worked and the purchaser of the land is deemed the equitable owner thereof and the seller is the owner of the purchase price.

6. Conversion ⇨11

Whether equitable conversion which exists from time valid contract of sale of realty is entered into is absolute will depend on whether the terms of the contract are subsequently complied with.

7. Vendor and purchaser ⇨54

The fact that the vendor holds legal title as security for payment of purchase price

does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money, or than are held in land by a mortgagee who takes for his security a conveyance absolute in form instead of a formal mortgage.

8. Vendor and purchaser ⇨54

On the making of an executory contract for the sale of land of which specific performance would be decreed, a court of equity will consider the purchaser as the owner of the land, and that the vendor holds the legal title in trust for the purchaser, while the purchaser is the trustee of the vendor as regards the purchase money.

9. Descent and distribution ⇨11

Dower ⇨14

Wills ⇨6

Contract purchaser of realty may devise his interest in property under name of real estate or real property, and it passes by descent to his heirs and is subject to the dower rights of the wife.

10. Descent and distribution ⇨128

Executors and administrators ⇨49

Wills ⇨839

On death of contract vendor, land passes to his heir or devisee subject to the obligations to convey in accordance with the contract, while the right to receive the purchase money being a personal chose in action passes to the vendor's personal representative, and the heir or devisee, although he may be compelled either by purchaser or personal representative of the vendor to make conveyance to the purchaser, acquires no benefit from so doing.

11. Descent and distribution ⇨75

Executors and administrators ⇨135

Wills ⇨722

On death of the contract purchaser of realty, his right in equity to compel conveyance of the land passes as land to his heir or devisee, while the obligation to pay the purchase price devolves upon the personal representative as a person liable on the contracts of the decedent.

12. Homestead ⇨151

As respects whether land acquired by husband under contract to purchase from his father during his marriage was community property on which probate homestead could be vested in widow, neither husband nor wife acquired title to land by in-

heritance, but title was acquired by purchase pursuant to terms of contract, and all that husband or his brothers and sister inherited from estate of their father and mother was right to participate in the unpaid proceeds of the sale. Probate Code, § 661; Civ.Code, §§ 164, 687.

13. Vendor and purchaser ⇨54

By the execution of a valid enforceable contract to sell realty, the vendee becomes the equitable owner of the title subject only to be divested thereof for breach of the contract, and entire purchase price is not required to be first paid or tendered to vendor to accomplish conveyance of equitable title.

14. Vendor and purchaser ⇨54

Under enforceable contract for sale of land, all that vendor retains is bare legal title together with vendor's lien to enforce terms of contract unless it is otherwise expressed in the contract.

15. Descent and distribution ⇨75

The heirs of the vendor of realty to whom a vendor's lien passed would possess no greater power by virtue of the lien than the vendor had, which is a mere personal privilege to enforce the lien in a proper action therefor which could be waived by the acts or conduct of the vendor or his heirs, indicating that they did not rely on it to enforce the unpaid portion of the purchase price of the land.

16. Vendor and purchaser ⇨246

A vendor's lien is not an absolute charge on the land, but is a mere personal privilege to resort to the land if desired as a means of enforcement of the terms of the contract.

17. Homestead ⇨96, 151

The heirs of the vendor of realty who acquired a vendor's lien could not defeat right of widow of purchaser to probate homestead on property, but could enforce lien by appropriate proceeding to have homestead vest in widow subject to lien for payment of unpaid portion of purchase price on the land. Probate Code, § 661; Civ.Code, §§ 164, 687.

18. Executors and administrators ⇨264(2)

Vendor and purchaser ⇨266(6)

In absence of agreement to that effect, the vendor's lien is not waived by merely accepting from the vendee his promissory note for the unpaid portion of the purchase price of the land nor by filing in the estate

of the vendee a claim for allowance on that account.

19. Vendor and purchaser Ⓒ266(1)

A vendor's lien may be waived by acts and conduct inconsistent with the continuing claim therefor.

20. Descent and distribution Ⓒ84

Execution and delivery by heirs of contract vendor, of written assignment to vendee of all interest in estate of widow of vendor on account of sale of land to vendee, constituted evidence of waiver of claims of liens against the land.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of William Reid, deceased, wherein Carrie Reid filed a petition to set aside to her as a homestead a tract of land with dwelling house thereon, which was opposed by Margaret Reid and others. From a decree setting apart to the surviving widow the homestead, Margaret Reid and others appeal.

Affirmed.

Henry J. Soldati, of Petaluma, for appellants.

Karl Brooks, of Petaluma, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

From a decree setting apart to the surviving widow a homestead, under the provisions of section 661 of the Probate Code, the brothers and a sister of the deceased have appealed.

It is asserted the finding of the court that the property from which the homestead was assigned was the community property of the deceased and his wife is not supported by the evidence.

William Reid died intestate in Sonoma county December 19, 1935, leaving his widow, Carrie Reid, surviving him. They were married August 27, 1917. There were no children as the issue of their marriage. The decedent was survived by three brothers and a sister, who are the appellants in this case. Upon petition therefor, letters of administration of the estate of said deceased were duly issued. The estate consisted of real and personal property, including 7½ acres of farm land, being part of allotment No. 9 of the Rancho Rob-

lar de la Miseria in Sonoma county, together with the dwelling house thereon. The widow petitioned the probate court to set aside to her, as a homestead, that tract of land with the dwelling house thereon. The brothers and sister of the deceased filed their opposition to that petition for a homestead, alleging that the land in question was the separate property of the deceased, and not the community property of the deceased and his surviving wife; that the proceeds from the sale of the land were previously devised by the will of their mother, Mary S. Reid, to the deceased and his said brothers and sister, as residuary legatees, share and share alike, and that in the course of probating the estate of Mary S. Reid, deceased, William Reid agreed to and did purchase the respective interests in said land from his brothers and sister on January 1, 1935, executing and delivering to them his promissory notes therefor, as follows: To Margaret Reid a note for \$950.76, to John Reid a note for \$838.46, and to David Reid a note for \$351.16, which notes were not paid. Claims for these notes were subsequently regularly filed in the estate of William Reid, deceased.

At the hearing of the petition for homestead evidence was adduced in behalf of the respective parties. The court adopted findings determining that the real estate in question was the community property of the deceased and his wife, Carrie Reid; that the property, at the time of the death of William Reid, was worth the sum of \$6,275, and was then subject to a trust deed in favor of the Federal Land Bank of Berkeley, California, to secure an indebtedness thereon in the sum of \$3,000, incurred by William Reid in his lifetime to construct the dwelling house on the premises; that the land was formerly owned by Andrew Reid, the father of William; that on October 26, 1928, Andrew Reid executed and delivered to William an agreement to sell the land for \$7,000; that William Reid and his wife thereafter occupied and used the land; that prior to the death of Andrew Reid, which occurred August 21, 1930, William paid to his father on account of the purchase price of said land the sum of \$1,000 from the community funds of himself and wife; that upon the death of Andrew Reid, his wife, Mary S. Reid, inherited from his estate, and there was distributed to her his entire property, including the unpaid portion of the purchase price of the land in question,

represented by the contract of sale thereof, which then amounted to the sum of \$6,000; that Mary S. Reid, the mother of William, then executed and delivered to him a written renewal of her husband's agreement to sell the real property, upon the same terms contained in the former instrument; that prior to the death of Mary S. Reid, which occurred March 28, 1934, William paid to his mother from the community funds of himself and wife the balance of the purchase price of said land, except the sum of \$3,934.76; that subsequently William Reid borrowed from the Federal Land Bank of Berkeley the sum of \$3,000 secured by a trust deed on said land, with which funds he constructed the dwelling house situated on the premises; that in settlement of the claims of his brothers and sister for their asserted interests in their mother's estate, William executed and delivered to them his promissory notes above mentioned, in consideration of which each brother and the sister executed and filed in July, 1935, in the estate of their mother, their separate written assignments of interests containing the following language: "I * * * do hereby sell, assign, transfer and set over unto William Reid, * * * all of my right, title and interest in and to the following described real estate."

The court further found that said payments were made by William to his brothers and sister in full settlement of their claims for their shares of the unpaid portion of the purchase price of the land, and that the assignments conveyed to William all of their right, title and interest in and to the property which became and was the community property of William Reid and his wife Carrie, free and clear of all liens and claims, except the \$3,000 trust deed which was held by the Federal Land Bank of Berkeley. On August 2, 1935, the probate court distributed in the estate of Mary S. Reid, deceased, to William Reid the entire fee in said 7½-acre tract of land, pursuant to the contract of purchase thereof and the assignments of interest therein. That decree of distribution merely confirmed the title to that land which was acquired by the original contract of purchase.

On submission of the petition for a homestead in the estate of William Reid, deceased, the court rendered its decree based on the foregoing findings, awarding the widow Carrie Reid a probate homestead on said 7½-acre tract of land, subject

only to the trust deed to secure the \$3,000 loan in favor of the Federal Land Bank of Berkeley. From that decree this appeal was perfected.

[1] We are of the opinion the evidence adequately supports the findings of the court and the decree awarding the homestead to the widow, Carrie Reid.

[2,3] In this case the evidence indicates that William Reid acquired title to the property in question from his father October 26, 1928, by means of the contract to purchase it. At that time he and his wife had been married for eleven years. The presumption is that all property which is acquired during marriage, except that which is obtained by gift, bequest, devise or descent, is community property. Sections 164 and 687, Civ.Code; 3 Cal.Jur. Supp. 553, § 61; Estate of Caswell, 105 Cal.App. 475, 288 P. 102; Estate of Hill, 167 Cal. 59, 138 P. 690. It is said in the Hill Case, last cited, that in determining whether property acquired by a husband is separate or community in its nature, the equitable status of a purchaser's title rather than the mere technical means by which the legal title is vested must control.

[4] Under the circumstances of this case we are of the opinion the title to the land in question which passed to William Reid at the time he entered into the contract with his father to purchase it, vested in him so as to constitute community property upon which a probate homestead may be vested in the widow under the provisions of section 661 of the Probate Code, free and clear of the vendor's lien to enforce the payment of the balance of the purchase price thereof. McClellan v. Lewis, 35 Cal.App. 64, 68, 169 P. 436; Estate of Dwyer, 159 Cal. 664, 675, 115 P. 235; Hunt v. Inner Harbor Land Co., 61 Cal. App. 271, 273, 214 P. 998; Longmaid v. Coulter, 123 Cal. 208, 55 P. 791; Miller v. Waddingham, 91 Cal. 377, 381, 27 P. 750, 13 L.R.A. 680; Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 311, 197 P. 99; 1 Tiffany on Real Property 456, §§ 125, 127.

In the McClellan Case, supra, which involved the validity of a homestead vested in community property under a conditional contract to purchase the property, the court said (page 438):

"They [the purchasers] thereby became the equitable owners, and the vendor held the legal title merely in trust for said ven-

dees. *Baldwin v. Morgan*, 50 Cal. 585; *Gilbert v. Sleeper*, 71 Cal. 290, 12 P. 172." See *Orange Cove Water Co. v. Sampson*, 78 Cal.App. 334, 341, 248 P. 526, to the same effect.

[5,6] In the *Dwyer Estate Case*, supra, the same principle was declared in the following language (page 240):

"When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof, and the seller is considered the owner of the purchase price. The equitable conversion thus deemed to exist from the time a valid contract of sale is entered into may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with."

In the *Hunt Case*, supra, it is likewise said (page 999):

"An executory contract to convey has the effect of vesting the equitable estate in the vendee, leaving in the vendor the naked legal title."

[7] The nature and limitation of the title to real property retained by the vendor upon a contract for sale thereof, is declared by the court in the *Miller Case*, supra, as follows (page 751):

"The fact that the vendor holds the legal title as security for such payment does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money, or than are held in land by a mortgagee, who takes for his security a conveyance absolute in form, instead of a formal mortgage."

[8-11] The nature of the title to land which is conveyed by means of a conditional contract of sale thereof is very fully and clearly expressed in 1 *Tiffany on Real Property*, p. 456, §§ 125, 127. It is there said in part:

"It is frequently said that on the making of an executory contract for the sale of land, of which specific performance would be decreed, a court of equity, regarding as done that which ought to be done, will consider the purchaser as the owner of the land. It is also frequently said that the vendor holds the legal title in trust for the purchaser, and occasionally the purchaser is said to be the trustee of the vendor as regards the purchase money.

"In support of the statement that equity regards the purchaser as the owner of the property, reference is ordinarily made to one or more of the following considerations. The purchaser may devise his interest in the property under the name of real estate or real property, it passes by descent to his heirs, and it is frequently subject to the dower rights of the wife.

* * *

"On the death of the vendor the land passes to his heir or devisee subject to the obligation to which it was subject in the vendor's hands, to convey in accordance with the contract. On the other hand the right to receive the purchase money, being a personal chose in action, passes to the vendor's personal representative, and the heir or devisee, although he may be compelled, either by the purchaser, or the personal representative of the vendor, to make a conveyance to the purchaser, acquires no benefit from so doing.

"On the death of the purchaser, his right in equity to compel a conveyance of the land is regarded as passing as land to his heir or devisee, while the obligation to pay the purchase price devolves upon the personal representative, as the person liable on the contracts of decedent."

From the preceding authorities we conclude that the land in question vested in William Reid and his wife, Carrie, as of the date when the contract to purchase it was originally made with his father, October 26, 1928, as their community property, so as to authorize the vesting of a homestead thereon.

[12] Neither William Reid nor his wife acquired title to that land by inheritance. They acquired title thereto by purchase pursuant to the terms of the contract. All that they or their brothers and sister inherited from the estates of their father and mother, so far as the real estate was concerned, was the right to participate in the unpaid proceeds of that sale.

[13,14] Appellants contend that William Reid did not acquire the equitable title to the land for the reason that he failed to fully pay the purchase price therefor prior to his death. That rule appears to prevail in some jurisdictions. 1 *Tiffany on Real Property*, 2d Ed., p. 750, § 214. In California and elsewhere, by the weight of authority, that is not the accepted rule. By the execution of a valid enforceable

contract to sell real estate the vendee becomes the equitable owner of the title, subject only to be divested thereof for breach of the contract. In support of their contention in that regard, the appellants cite the case of *McClellan v. Lewis*, supra. It is true in that case the vendee did tender payment of the entire balance of the purchase price of the land. That tender, however, was not determined to have been a necessary condition precedent to the passing of an equitable title to the vendee. We do not believe the entire purchase price of real property must be first paid or tendered to the vendor to accomplish a conveyance of equitable title to the vendee under a valid conditional contract to purchase the land. As the California cases declare, all that the vendor retains under such circumstances is the bare legal title, together with a vendor's lien to enforce the terms of the contract, unless it is otherwise expressed in the contract.

[15,16] Assuming that upon the death of a vendor of real property, which is subject to an incompleted conditional contract of sale thereof, the vendor's lien passes to his heirs, they possess no greater power by virtue of the lien than the vendor held, which is a mere personal privilege to enforce the lien in a proper action therefor. The lien may be waived by the acts or conduct of the vendor or his heirs indicating that they do not rely upon it to enforce the unpaid portion of the purchase price of the land. *Royal Consolidated Mining Co. v. Royal Consolidated Mines Co., Ltd.*, 157 Cal. 737, 110 P. 123, 137 Am.St.Rep. 165. The lien is not an absolute charge on the land. It is a mere personal privilege to resort to it if desired as a means of enforcing the terms of the contract. *Schwartz v. Mead*, 116 Cal.App. 606, 613, 3 P.2d 48; 17 Cal.Jur. 718, § 23. In the authority last cited it is said:

"A vendor's implied lien after conveyance is created by the law and not by contract of the parties, as are mortgages. It is not a specific and absolute charge on the land, but a mere equitable right to resort to it upon failure of payment by the vendee, that is, it is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced."

[17] In the present case there was no effort on the part of the appellants to enforce their asserted vendor's lien, if indeed they did not deliberately waive it. They brought no action to enforce it. On the contrary, they accepted the vendee's promissory notes for their portions of the proceeds of that sale of land and deliberately executed assignments of their entire interests in that real property. They also filed claims for those notes in the estate of their deceased brother. Even though they retained their vendor's lien that would not defeat the widow's right to a probate homestead on the property. The most that could be claimed in a proper suit to enforce such lien would be that the probate court should have vested the homestead in the widow subject to the lien for the payment of their unpaid portion of the purchase price of the land. *Longmaid v. Coulter*, 123 Cal. 208, 217, 55 P. 791. There is no merit in that contention under the circumstances of this case.

[18-20] We are of the opinion there is substantial evidence to support the finding of the court that the appellants had no lien on the property, and that their vendor's lien was waived. It is true that, in the absence of an agreement to that effect, a vendor's lien is not waived by merely accepting from the vendee his promissory note for the unpaid portion of the purchase price of the land (25 Cal.Jur. 754, § 221; *Baum v. Grigsby*, 21 Cal. 172, 81 Am.Dec. 153), nor by filing in the estate of the vendee a claim for allowance on that account. A vendor's lien may be waived by acts and conduct inconsistent with a continuing claim therefor (25 Cal.Jur. p. 751, § 218; 66 C.J. 1259, § 1157). The appellants deliberately executed and delivered to the vendee their written assignments of all interest in their mother's estate on account of the sale of the land in question. That certainly is evidence they intended to waive all further claims of liens upon that land.

The decree vesting a probate homestead in the designated land in Carrie Reid, the widow of William Reid, deceased, is affirmed.

I concur: PULLEN, P. J.

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ASHER v. JOHNSON, State Treasurer, et al., and seven other cases.
Nos. 5887-5894.

District Court of Appeal, Third District,
California.

May 18, 1938.

Hearing Denied by Supreme Court
July 15, 1938.

1. Gaming ⇨49(3)

Evidence that winner of "Tango" game was determined by the lodging of five balls in numbered apertures of table corresponding to numbers of five separate figures appearing in a straight line on card held by player, that winner was paid in merchandise redeemable in cash immediately on receipt thereof, and that loser forfeited the contribution paid for privilege of playing, authorized finding that "Tango" was an illegal "game of chance." Pen.Code, § 330.

[Ed. Note.—For other definitions of "Game of Chance," see Words & Phrases.]

2. Appeal and error ⇨1010(1)

A finding that is supported by ample evidence is binding on a court of appeal.

3. Stipulations ⇨14(4)

A stipulation of counsel in course of trial with relation to a valid issue may be accepted as foundation for a finding of fact.

4. Stipulations ⇨16

Whether a stipulation in open court is binding depends on the circumstances under which it is made.

5. Licenses ⇨34

Taxpayers seeking to recover sales taxes paid under protest had burden of showing they were not engaged in selling personal property, as alleged in complaint. St.1933, p. 2599.

6. Lotteries ⇨15

Games of chance, such as lotteries, are illegal, so that the winner gains no title to or right of possession of property at stake, and participants have no standing in a court of law or equity. Pen.Code, § 330.

7. Taxation ⇨59

An unlawful business may be taxed by governmental agencies.

8. Licenses ⇨1

A retail "sales tax," which requires payment of a specified percentage of gross re-

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ceipts from sales of merchandise as a privilege of conducting the business of selling intangible personal property, is an "excise" or "privilege tax" as distinguished from a "personal property tax." St.1933, p. 2599, § 2.

[Ed. Note.—For other definitions of "Sales Tax," see Words & Phrases.]

9. Contracts ⇨140

The illegality of a transaction between two parties will not bar the right of one to maintain an action against the other founded on a distinct and collateral consideration, without resort to the illegal transaction.

10. Action ⇨5

A plaintiff, who is a culpable party and is compelled to disclose the fact that transaction on which he relies for recovery is an illegal violation of criminal law, will be denied relief.

11. Gaming ⇨23

Where public morals are directly or indirectly concerned, courts will not critically examine details of a transaction to determine that the source of funds which it is sought to recover is technically disconnected with the procuring of a share thereof, so as to restore the proceeds of gambling games and encourage the continued violation of law.

12. Contracts ⇨137(2)

A contract is invalid if it is so connected with an illegal purpose as to be inseparable from it.

13. Contracts ⇨138(3)

If a connection between an original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery.

14. Contracts ⇨141(1)

One who participates in the benefits derived from an illegal contract or enterprise is deemed to have had knowledge thereof.

15. Contracts ⇨102

Participation in the unlawful intention of a party to a contract renders the contract illegal as to such participant.

16. Contracts ⇨102

One may be deemed to be a participant in the unlawful design of another party to a contract, if he shares in the benefits of the violation of law, so as to render the contract illegal as to him.

17. Contracts ⚡103

A contract which is founded on an illegal consideration, or which is made to further any matter prohibited by statute or to aid any party therein, is void.

18. Contracts ⚡138(1)

The test of whether a demand connected with an illegal transaction may be enforced at law is whether plaintiff requires the aid of the illegal transaction to establish his case.

19. Licenses ⚡34

Taxpayers, who established the illegal nature of "Tango" games operated by them, in proving that state wrongfully collected a percentage of the proceeds thereof as a retail sales tax under threat to close the games, were barred from recovering the taxes paid, as against contention that the illegal gambling transactions were distinct from collection of taxes. St.1933, pp. 2599, 2602, 2603, §§ 2, 9, 11; Pen.Code, § 330.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Actions by Jefferson W. Asher, by the Plaza Amusement Company, by the Ocean Park Pier Amusement Corporation, by Claude L. Langley and another, by the First National Amusement Company, and by the Coast Amusement Company, against Charles G. Johnson, Treasurer of the State of California, and others, to recover sales taxes paid under protest or to obtain the cancellation of bonds given to secure the payment thereof. Judgments for plaintiffs, and defendants appeal.

Reversed with directions.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for appellants.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed in eight cases which were consolidated for the purpose of trial. These actions were brought to recover sales taxes paid under protest by the respondents or to obtain the cancellation of bonds given to secure the payment of such taxes. The taxes were collected and the bonds required, in good faith, by the agents of the state board of equaliza-

tion, pursuant to the provisions of the California Retail Sales Tax Act. Stats. 1933, p. 2599, Deering's Supp.Laws of Calif., 1933, p. 2360, Act 8493.

The trial court found that the gross receipts of the enterprises from which the taxes were collected and the bonds required were not derived from sales of tangible personal property, but, upon the contrary, that they represent the income from the operation of gambling devices, prohibited by law, and that the state therefore wrongfully collected and retains the taxes and bonds.

The attorney general contends that since the transactions involve funds illegally derived from the operation of gambling devices contrary to the provisions of section 330 of the Penal Code, courts of justice will not lend their aid to recover such illegal funds; that the respondents have no title to such funds which courts will recognize or respect.

On the theory that the violations of the criminal law, by means of which the funds acquired by the respondents were derived in transactions completed before the taxes were demanded and distinct from the collection thereof and of the furnishing of the bonds, the trial court held that the rule which prompts courts to refrain from lending its aid to illegal transactions has no application. Judgment in each of the eight cases was accordingly rendered in favor of the plaintiff. From those judgments the state has appealed.

The sole question to be determined on these appeals is whether the collection of sales taxes and the requirement to furnish the bonds to secure such payments are so disconnected and separate from the operating of the illegal gambling devices from which the funds were derived that the salutary principle in the interest of public policy which precludes courts from lending their aid has no application under the circumstances of these cases. There is little or no controversy regarding the law applicable to that principle. The only difficulty arises in applying the law to the facts of these cases.

[1,2] In 1933 the plaintiffs were engaged in operating at Santa Monica and Ventura illegal enterprises by means of devices variously called "Tango," "Monaco," "Ritz," "Plaza B," "Plaza 7," "Bonanza," "Horse Racer," "Wheel 'O" and "Skill Ball." Their places of business were commonly called "Amusement Halls" or "Pal-

aces of Skill." All of these devices were operated similar to the game of tango, which is a game of pure chance prohibited by section 330 of the Penal Code. *Schur v. Johnson*, 2 Cal.App.2d 680, 38 P.2d 844. For convenience we will refer to the enterprises as "Tango games." In connection with these games the owners carried stocks of merchandise in the form of cigarettes and tobacco. The customers or participants in the games paid the operator from ten to twenty-five cents for the privilege of playing, in consideration for which they received cards containing a series of numbers and also five balls to be used therein. The tango table contains 75 apertures which are irregularly numbered from 1 to 75. If the patron succeeds in lodging five balls in holes corresponding to the numbers of five separate figures appearing on the card in a straight line, he is deemed to have won the game, and is then paid by the proprietor with merchandise from the shelves in the place of business, consisting of cigarettes or tobacco. If the player fails to secure the necessary numbers, he receives no merchandise and his contribution is then forfeited. The merchandise is usually redeemed by the payment of its equivalent in cash. The use of the merchandise is a subterfuge to avoid liability for violating the law. It becomes a mere "representative of value" substituted to cover the losses sustained by the owners of the gambling devices. It is claimed one's success in playing these tango games depends largely on skill. We think not. At least the trial court found that they were illegal games of chance. There is ample evidence to support that finding, and we are therefore bound by it.

With respect to the question as to whether these enterprises constitute the selling of merchandise in the form of cigarettes and tobacco, which are tangible personal property, in contemplation of the definition of the term "sales" as it is found in section 2 of the California Retail Sales Tax Act, St.1933, p. 2599, the proprietors appear to have been quite inconsistent. Evidently, to avoid the liability under section 330 of the Penal Code, for operating a "banking or percentage game" played for "money, checks, credit, or other representative of value," they assert, by carrying a stock of merchandise and paying the losses of the games in that manner, that they are engaged in the business of selling personal property. When the state board of equalization demands that they shall procure

permits to retail tangible personal property and pay to the state $2\frac{1}{2}$ per cent of the gross income from such sales they claim they are not engaged in selling personal property but, on the contrary, that they are only conducting games of skill for the purpose of amusement. It may be a serious question as to whether bartering or disposing of personal property by paying the losses of tango games therewith, constitutes sales of merchandise in contemplation of the Retail Sales Tax Act. Section 2 of that act defines the term "sales" as follows:

"'Sale' means any transfer, exchange or barter, conditional or otherwise, *in any manner or by any means whatsoever*, of tangible personal property, for a consideration."

It is not necessary for us to determine whether the transactions involved in these cases constitute sales of personal property. We specifically refrain from so doing. The trial court found in accordance with a stipulation:

"That in the conduct of said business plaintiff was not, during said period, and is not now, and never has been, engaged in the business of selling tangible personal property at retail or otherwise."

After the plaintiffs adduced 150 pages of evidence attempting to prove they were not engaged in selling personal property, counsel for the defendants said:

"To save the time of the court, we will stipulate for the purpose of these actions there were not any sales of tangible personal property."

[3,4] A stipulation of counsel in the course of a trial, with relation to a valid issue in the case, may be accepted as foundation for a finding of fact. Whether a stipulation in open court becomes binding and controlling depends on the circumstances under which it is made. In the present cases we do not question the binding effect of the stipulation with respect to that issue. The respondents, however, contend that this stipulation and the finding of the court in that regard are absolutely determinative of these appeals. We think not. Conceding for the purpose of these appeals that the respondents were not engaged in retailing tangible personal property, and that the board of equalization, therefore, was not authorized to collect the taxes or enforce the giving of bonds, still we have the problem of determining whether the operation of those illegal de-

vices were so separate and disconnected from the collecting, in good faith, of taxes by the state authorities, based on the gross income from the tango games, that a court of justice will refrain from lending its aid to restore to the owners thereof their ill-gotten gains. We cannot afford to temporize on principles which vitally affect the public welfare.

In the belief that respondents' method of disposing of merchandise in the form of cigarettes and tobacco, to pay to patrons of the games their winnings, constituted sales of tangible personal property within the meaning of the California Retail Sales Tax Act, the agents of the board of equalization demanded payments of taxes in the midst of the quarterly term during which they became due, equivalent in amounts to $2\frac{1}{2}$ per cent of the gross receipts therefrom. These demands were made, in most instances, September 21, 1933, for taxes due on incomes received from August 1st to September 14th of the same year. The taxes demanded, for the period of a month and a half in most cases, ranged from \$93 to \$2,009. These proceeds received in so brief a period of time indicate that they were not derived from the legitimate sales of cigarettes and tobacco, but that they represent the profits from gambling devices. The Ocean Park Pier Company paid \$2,009 taxes on the proceeds of its tango games in the period of 45 days. That represents $2\frac{1}{2}$ per cent of its proceeds during a brief period of time. The company, therefore, derived \$80,360 from its tango games in a month and a half. This indicates the extent to which the spirit of gambling prevails, and the serious result of encouraging its continuance.

In determining whether a court will direct the return of money collected under the circumstances of these cases, it becomes important to decide whether it was necessary for the respondents to disclose the illegal nature of their enterprises to prove that they were not engaged in selling personal property. Under the pleadings in these cases it was necessary for the respondents to prove the nature of the transactions from which they derived the funds which the state sought to tax. In the several complaints it is alleged:

"None of his gross receipts in the transaction of his business are or ever have been received from the sale by him, either as principal or agent, of tangible personal property."

[5] The preceding allegations were specifically denied by the defendants in each case. The essential issue, therefore, became the nature of the business from which the taxed proceeds were derived. The burden was on the plaintiffs to show they were not engaged in selling personal property. A hundred and fifty pages of transcript were consumed in recording plaintiffs' proof upon that issue, after which, to save the time of the court and because they thought it was not essential to the determination of the cases, the attorneys for defendants made the stipulation above quoted. In their effort to prove they were not selling personal property, the plaintiffs conclusively established the fact that their proceeds were derived from gambling devices operated contrary to the provisions of section 330 of the Penal Code. The trial court so found. That is an established fact in these cases. Thereupon the question immediately arose as to whether the owners of the illegal enterprises possessed such right or title to the portion thereof held by the state as sales taxes, as would entitle them to restitution thereof, and whether the nature of the transactions precludes the court from lending its aid to restore the property.

[6] In the late opinion of the Supreme Court in *People v. Rosen*, 78 P.2d 727, involving the proceeds derived from a tango game, it is said (page 728):

"It is the law in this state that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity. *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Bank of Orland v. Harlan*, 188 Cal. 413, 421, 206 P. 75; 16 Cal.Jur. p. 716."

In the case of *Dorrell v. Clark*, 90 Mont. 585, 4 P.2d 712, 79 A.L.R. 1000, a judgment refusing to restore to the plaintiff money found in a slot machine which was seized by the sheriff was affirmed. The law did not authorize the seizing of money in a gambling device. The sheriff arbitrarily took it and turned it over to the clerk. On appeal it was determined the owner of the machine had no title to gambling funds which a court would respect; that a party to an illegal enterprise could not come into a court of law to ask that its illegal project be carried out. The court said (page 713):

"In seeking to recover the money, plaintiff brought his suit in conversion, alleging that the sheriff, without right or authority, seized and carried away and detains property to the 'immediate possession' of which plaintiff was entitled. In such an action plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary. * * *

"All of these facts [the maintenance of the illegal slot machine containing the money] were necessarily disclosed to the court by the plaintiff in attempting to make a prima facie case. Thus the plaintiff, admitting the violation of the law, asked the aid of the very court charged with the duty of punishing that violation, and which had performed that duty, in securing the fruits of his outlawry, which he admitted he would not be entitled to retain under the law, had he reduced the same to possession. 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.' 13 C.J. 492. * * *

"Plaintiff asserts that the general rule is that illegality cannot be set up by a third person, but is only available to a party to a contract (13 C.J. 508); but he fails to note that the text reads: 'This rule is of course subject to an exception, where it is attempted to assert rights based on the contract.' Strictly speaking, there is no contract here involved; plaintiff merely seeks the aid of the court to reduce to possession the spoils of the law's violation.

"* * * Whatever may or may not be done with the money in the custody of the court, the power of our courts, either at law or in equity, cannot be invoked in aid of one showing a violation of the law, to complete the illegal transaction and secure to the violator the fruits of his outlawry."

The respondents contend the acts of gambling in the present cases from which the particular receipts in question were derived were completed before the state demanded the payment of taxes thereon, or the furnishing of bonds to secure such taxes, and, moreover, that the gambling transactions were separate and distinct from the collection of taxes on the pro-

ceeds therefrom, and, the principle of refraining from determining a suit involving illegal transactions does not apply, and that the court, therefore, properly directed the return of the property.

We feel convinced from the evidence that the transactions of operating the tango games under the circumstances of these cases are not so disconnected with the collection of the taxes or the furnishing of bonds that a court may lend its aid to enforce the return of such ill-gotten gains. On the contrary, we are of the opinion the collection of the taxes and the procuring of the bonds are so directly associated and intermingled that the principle of refusing to become the instrument of deciding litigation necessarily based on such illegal transactions does apply, and that the trial court, therefore, erroneously rendered judgments in favor of the plaintiffs in these cases.

[7,8] In support of our conclusions that neither the completion of the tango games prior to the demand for taxes, nor the distinction between the operation of the games and the collection of taxes furnish reasons for waiving the principle of refusing to interfere, we suggest the following facts: The gambling games in question are continuing violations of the criminal law. It may not be reasonably said the game terminates when an unlucky victim plays five balls and loses. It is evident from the large receipts that the games continue. A favorable decision in these cases will encourage them to continue. The taxes which were paid were collected in the middle of the quarterly period fixed by the statute for them to become due. They were founded on the receipts from gambling games. They were paid by the plaintiffs as a condition upon which they would be permitted to continue to operate their games. The complaints alleged that the board threatened to close their businesses if they refused or failed to pay the taxes or to secure them by giving bonds, and that under that "duress and compulsion" they paid the taxes under protest and furnished the bonds. The payment of these taxes, therefore, conferred permissive authority to continue to maintain the games. We do not infer the authorities intentionally licensed the operation of gambling devices. They assumed, and undoubtedly honestly believed, the enterprises constituted the maintenance of businesses in retailing tangible

personal property within the meaning of the Retail Sales Tax Act. It is fundamental that an unlawful business may be taxed by governmental agencies. *U. S. v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020; *Salt Lake City v. Hollister*, 118 U.S. 256, 6 S.Ct. 1055, 30 L.Ed. 176. The Sales Tax Act specifically provides for a privilege tax as distinguished from a mere property tax. In the case of *Roth Drug, Inc., v. Johnson*, 13 Cal. App.2d 720, 730, 57 P.2d 1022, 1026, it is said in that regard:

"The retail sales tax, which requires the payment of a specified percentage of the gross receipts from the sales of merchandise, as a *privilege of conducting the business of selling tangible personal property*, is an 'excise' or 'privilege tax,' as distinguished from a personal property tax. 2 Cooley on Taxation (3d Ed.) p. 1094; 2 Cooley's Constitutional Limitations (8th Ed.) p. 988; 61 C.J. p. 242, §§ 227, 228; *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P.(2d) 14; *Morrow v. Henneford*, 182 Wash. 625, 47 P.(2d) 1016."

This California Retail Sales Tax Act provides that it shall be unlawful for any person to engage in retailing personal property within the state without first procuring a permit therefor. The act provides a nominal fee of \$1 for this permit. Any person who violates the act is guilty of a misdemeanor. Section 9 of the act, St.1933, p. 2602, provides that the tax shall become a direct obligation on the person who retails personal property, payable in quarterly instalments on or before the 15th day of the month next succeeding each quarter during which the goods are sold. At the option of the board of equalization, the taxes may be required to be paid at any time. Section 11 of the act, St. 1933, p. 2603, authorizes the board to enforce the giving of bonds to secure the payment of taxes. The act makes it the duty of the board to require the payment of such taxes at the times and in the manner directed.

Pursuant to the terms of that act the agents of the board ascertained the gross proceeds of the various enterprises of the plaintiffs from August 1 to September 14, 1933, and promptly demanded payment of sales taxes thereon at the rate of 2½ per cent thereof, threatening to close the businesses if the taxes were not promptly paid or secured by the furnishing of bonds. Some of the plaintiffs paid the taxes under

protest. Others gave their bonds to secure the claimed taxes. The defendants actually received a portion of the illegal funds derived from the tango games, in amount of 2½ per cent of the gross receipts thereof. The payment or securing of those taxes resulted in the plaintiffs continuing to operate their tango games. Under such circumstances it clearly may not be said that because the plaintiffs had already pocketed the proceeds derived from 45 days' operation of illegal devices, and that the state under the provisions of the Retail Sales Tax Act thereafter enforced the payment or security of 2½ per cent thereof, that the particular games from which the funds were derived were completed, or the transactions so distinct from the collection of taxes thereon, that a court should direct the restoration of such ill-gotten gains.

It does not matter that the agents of the state were not parties to the maintaining of the illegal games. The plaintiffs were the culpable parties. They now seek to recover a part of their funds obtained from gambling devices. They acquired their respective funds from illegal gambling. Part of those funds were seized by the state as sales taxes. The plaintiffs were unable to prove that the state wrongfully took a portion of their gambling proceeds until they conclusively established the illegal nature of their games. These cases appear to us to be eminently proper ones in which to enforce the wholesome rule to refuse to lend the aid of the court to restore property acquired and claimed as the proceeds of illegal gaming.

Many authorities are cited with respect to the rules of law applicable to *contracts* based on illegal transactions. These cases may throw light on the question involved in the present actions, but, as the court said in the *Dorrell Case*, *supra*, "there is no contract here involved." The principle which is invoked in these cases is the question as to whether a court will refuse, on the ground of public policy, to restore money derived from gambling at the suit of the culpable party, on the theory that it may tend to encourage the maintenance of unlawful games to the detriment of public morals and welfare. There is a clear distinction between those cases dependent on the principles affecting contracts, and the salutary rule invoked to uphold law and order.

[9] The respondents quote from 6 California Jurisprudence p. 160, § 111, as follows:

"Even though parties have been engaged in an illegal transaction, yet if the cause of action between them is disconnected from the illegal act and is founded upon a distinct and collateral consideration, and the plaintiff is not obliged to resort to the illegal contract in order to maintain the suit, the illegality of the former transaction will not impair or bar the right to maintain the suit. If the contract does not depend upon or require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. Therefore the test is declared to be whether the contract sought to be enforced can be separated from the illegal acts or contracts relied upon as avoiding it, and whether the plaintiff requires any aid from, or must in any way rely upon the illegal transaction in order to establish his case."

There is no doubt regarding the soundness of that declaration of law. For instance, if a gambler paid a tax collector improvement taxes on real property under protest with money previously acquired by means of illegal gambling, and he sought to recover the money on the ground that it was paid through coercion and force, the tax collector could not successfully defend that action on the ground that the money was derived from gambling, because there is no connection between the demand for taxes and the source from which the money was derived. But the facts of the present cases are vitally different from the circumstances of that illustration. In these cases the sales taxes sought to be recovered were procured by levying 2½ per cent of the very receipts of the illegal games. The maintenance of the games and the levying of taxes in these cases are directly connected. Moreover, the taxes were permissive in their nature. By the payment of the taxes the games were permitted to continue. The gambling enterprises and the collection of taxes were inseparably united. The plaintiffs were forced to disclose their illegal operation of the tango games in their attempt to prove they were not engaged in retailing tangible personal property. The facts of these cases, therefore, come directly within the foregoing text relied on by the respondents. That text precludes the operator of a gambling device under the circumstances of these cases from recovering the proceeds of such illegal games.

[10, 11] The rule is well established without conflict of authorities that when a plaintiff, who is the culpable party, is compelled to disclose the fact that the transaction upon which he relies for recovery is an illegal violation of criminal law, the courts will invariably refuse to determine the controversy, and will leave the offender against the law exactly where he finds himself at the outset of the litigation. Where public morals are directly or indirectly concerned, courts will not critically examine the details of a transaction to determine that the source of funds is technically disconnected with the procuring of a share thereof so as to restore the proceeds of gambling games and encourage the continued violation of law.

[12, 13] Often it is difficult to determine whether an illegal contract or transaction is so connected with the subject of litigation as to warrant a court in refusing its aid. In 12 American Jurisprudence p. 646, § 152, it is said in that regard:

"A contract is invalid if it is so connected with an illegal purpose as to be inseparable from it. * It is impossible, it has been said, to lay down any exact rule by which it may always be determined whether an agreement is collateral to, and so disconnected from, an illegal and immoral business as to make it enforceable, when it would not be enforceable if it were directly in aid of, or in the advancement or encouragement of, acts in violation of the law or if it were in furtherance of an illegal agreement. * * * If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery."

[14-16] It is held that one who participates in the benefits derived from an illegal contract or enterprise is deemed to have had knowledge thereof. It is said in 12 American Jurisprudence p. 650, § 156:

"The difference of opinion as to whether a contract is invalidated by the mere knowledge of one of the parties of the other's unlawful intention does not extend to participation in such intention. Even courts which entertain the view that mere knowledge is insufficient agree that participation in the unlawful intention renders the contract illegal. There would seem to be no doubt that one may be deemed to be a participant in the other's unlawful design

if he shares in the benefits of the violation of law."

[17, 18] In the case of *Smith v. California Thorn Cordage, Inc.*, 129 Cal.App. 93, 99, 18 P.2d 393, 395, the general rule applicable to the court's attitude toward transactions involving illegal contracts or games, is announced as follows:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and set up a case in which he must necessarily disclose an illegal contract as the groundwork of his claim."

In *Berka v. Woodward*, 125 Cal. 119, at page 127, 57 P. 777, at page 779, 45 L.R.A. 420, 73 Am.St.Rep. 31, the same rule is expressed in the following language:

"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation.' And in our own state it has been said (*Swanger v. Mayberry*, 59 Cal. 91): 'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void.' * * * 'The test,' says Judge Duncan in *Swan v. Scott*, 11 Serg. & R. [(Pa.) 155] 164, 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'"

In *Butler v. Agnew*, 9 Cal.App. 327, 332, 99 P. 395, 398, the same principle is likewise announced. It is there said:

"The test whether a demand which is connected with an illegal transaction may be enforced at law is: Does the plaintiff require the aid of the illegal transaction to establish his case? If the plaintiff cannot prove his case without showing that he has broken the law, the court will not

assist him, whatever the justice of his claim against the defendant. * * * The right of plaintiff to a division of the profits and proceeds, * * * can be established only by the introduction in evidence of the entire contract. The whole texture of it is so interwoven, each part with the other, that it is inseparable. To hold the transaction severable, as contended for by the appellant, would be to separate the shadow from the substance and apply the rule to the shadow, while the violator enjoyed the benefit of the substance of his illegal contract."

In the case of *Schur v. Johnson*, 2 Cal. App.2d 680, 38 P.2d 844, we passed directly on the very issue which is here presented, adversely to the respondents. It is insisted that what was there said regarding the policy of courts to refrain from determining controversies founded on illegal transactions, is dictum. We think not. The illegal nature of the tango game was directly involved on that appeal.

The numerous cases which are cited by the respondents are not in conflict with what we have previously said regarding the principle of refusing to extend the aid of courts to transactions founded on illegal transactions. A detailed discussion of those cases will serve no useful purpose.

[19] For the reasons that the evidence which was adduced at the trial of these cases necessarily disclosed the fact that the funds upon which the levies of taxes were imposed were derived from illegal games of chance, and that the operation of the tango games by the respondents was not disconnected with the collection of taxes and the furnishing of bonds, we are of the opinion the trial court erroneously rendered judgments in favor of the respondents.

The judgments are reversed, and the court is directed to render judgments against the plaintiffs to the effect that they take nothing by their actions.

We concur: PULLEN, P. J.; PLUMMER, J.

11 Cal.2d 303

GEORGE v. CITY OF LOS ANGELES et al.
L. A. 16562.

Supreme Court of California.

May 24, 1938.

Rehearing Denied June 23, 1938.

1. Municipal corporations ⇨766

Under the Public Liability Act where the injuries are caused by reason of defective construction of an improvement under a general plan adopted by the city, the liability of the city is not limited to case where the plan adopted is arbitrary and palpably dangerous beyond all reasonable doubt. St. 1923, p. 675, § 2.

2. Municipal corporations ⇨755(1), 763(1), 764(1)

A municipality is not an insurer of the safety of travelers on its streets but the duty is imposed upon city by Public Liability Act to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in proper manner. St.1923, p. 675, § 2.

3. Municipal corporations ⇨757(1), 767, 788 (3)

The acquisition, construction and repair of streets are functions of government and a municipality reserves the right to change its street improvement system when it is reasonably wise to do so, but if in the discharge of such function or in the exercise of the right the municipality creates a dangerous and defective condition in its public streets, it is liable for any injury to person or property resulting from such condition if it had knowledge thereof and failed or neglected to remedy the condition for a reasonable time after acquiring notice. St.1923, p. 675, § 2.

4. Municipal corporations ⇨755(1)

The liability of municipality for injuries to person or property resulting from dangerous condition of streets is based on negligence. St.1923, p. 675, § 2.

5. Municipal corporations ⇨821(3)

In action for injuries to person or property resulting from dangerous condition of streets, the question of the municipality's negligence is one for determination of jury. St.1923, p. 675, § 2.

6. Municipal corporations ⇨767

Under the Public Liability Act a municipality is liable for injuries resulting from the dangerous or defective condition of its

public streets whether such condition arises from the construction thereof in the first instance or is due to a defect created therein after its construction. St.1923, p. 675, § 2.

7. Municipal corporations ⇨755(1)

In determining municipality's liability under Public Liability Act, each case must depend upon its own state of facts. St.1923, p. 675, § 2.

8. Automobiles ⇨301(3)

In action for damages sustained when plaintiff's automobile left street and struck poles, complaint alleging that storm drain was constructed as part of street and in traveled portion of street with a somewhat precipitous slope from near center of street into drain, that curb was not parallel with street, and that location was insufficiently lighted was not vulnerable to city's general demurrer. St.1923, p. 675, § 2.

9. Electricity ⇨19(2)

In action for damages suffered when plaintiff's automobile left street and struck poles maintained by electric company within one foot of curb, complaint was sufficient as against electric company's general demurrer.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Walter George against the City of Los Angeles and another to recover compensation for damages allegedly sustained when plaintiff's automobile was caused to leave public street in the City of Los Angeles and to strike poles which had been erected by defendant Los Angeles Gas & Electric Corporation. From an adverse judgment plaintiff appeals.

Reversed.

Prior opinion, 71 P.2d 601.

Rehearing denied; SHENK and Houser, JJ., dissenting.

Bradner & Weil and Jerold E. Weil, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondent City of Los Angeles.

LeRoy M. Edwards and Neil G. Locke, both of Los Angeles, Cal., for respondent Los Angeles Gas & Electric Corporation.

CURTIS, Justice.

Plaintiff commenced this action to obtain compensation for damages alleged to have been suffered when his automobile was caused to leave a public street in the city of Los Angeles and to strike poles which had been erected by defendant Los Angeles Gas and Electric Corporation. Both the City of Los Angeles and the Los Angeles Gas and Electric Corporation were named parties defendant. Each defendant filed a demurrer and both demurrers were sustained without leave to amend. From the resulting judgment plaintiff appeals.

From the allegations in plaintiff's complaint it appears that on April 11, 1936, plaintiff was driving his automobile in a northerly direction along Allesandro street in the City of Los Angeles in a careful and prudent manner. Rosebud avenue runs into Allesandro street from the east but does not cross Allesandro street. The space at the intersection is referred to, apparently for lack of a better expression, as the "triangular portion". Plaintiff further alleged that the street was in a dangerous and defective condition; that a dip or depression had been constructed in the street which was such as to cause automobiles proceeding northerly to be thrown from their intended course of travel and into and upon the curbing along the easterly side of said street; the dip or depression lay within the triangular portion of Allesandro street and consisted of a downward pitch or grading toward the easterly curb and reaching its lowest point at a storm drain which extended approximately nine feet along the curb and two and one-half feet out into the traveled portion of the street; the cement-paved portion of the street had no appreciable slope or pitch toward the curb, but that within the triangular portion the street pitched curbsward until the drop became such that, beginning at a point eight feet out in the street from the curb and opposite the storm drain, the street dropped downward toward the curb at such an angle that it was approximately eleven inches lower at the curb than at a point eight feet out from the curb; the street was sixty feet wide and perfectly straight for more than one thousand feet southerly of the place of the accident where the street narrowed from sixty feet to forty feet; the easterly curb line was perfectly straight for over one thousand feet south of the place of the accident, where the curb deviated and curbed in a direction westerly; the street was paved in cement lanes or

strips southerly of the triangular portion referred to, but the two most easterly lanes terminated at the beginning of the triangular portion, and said triangular portion was paved with dark asphalt; two "telephone" poles stood within one foot of the curb at the scene of the accident; there was insufficient light at night to reasonably illuminate the locality; no warning signs of any kind were in place; the conditions were such as to create a hazard that persons traveling northerly on said street at night in either of the two cement lanes or strips nearest the righthand curb would be led to believe that said street continued straight ahead, but would find that the light-colored cement lanes or strips would suddenly terminate, and the roadway would apparently "blank out", and by reason of the manner of paving, lack of warning signs, change in course of direction of curb line, and dip or depression, an automobile would be caused to strike said easterly curb, leave the traveled portion of said street, and strike one or both of said poles; that the dip or depression was so located and so graded as to create a hazard that should an automobile enter into or upon the dip, the driver would be prevented from turning his automobile to the left to avoid colliding with the curb, but, on the contrary, the dip or depression would cause the automobile to swing to the right and strike the curb, leave the traveled portion of street and strike one or both of the poles; by reason of the said dangerous and defective condition and the negligence and failure of the officials of defendant city, plaintiff's automobile was caused to leave the traveled portion of the street and crash against the poles of defendant company. Plaintiff further alleged the filing of a verified written claim with the officials of defendant city and the rejection of the claim; and that defendant city and its officers had knowledge and notice of the dangerous and defective condition of the street for several years prior to the day of the accident.

The action is brought under the so-called Public Liability Act of 1923 (Stats.1923, chap. 328, p. 675), which provides in section 2 thereof that municipalities "shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets". This statute has frequently been before this court and also the District Courts of Appeal of the state. The purpose and scope of the statute have been fairly settled by the decisions hereinafter cited.

In support of the ruling of the trial court in sustaining the demurrer of the City of Los Angeles, respondent city contends that where the injury is caused by a particular plan of improvement adopted and carried out by a municipality, no cause of action against the municipality exists unless the plan adopted is beyond reasonable grounds arbitrary and palpably dangerous. While this may be the rule in some other jurisdictions as indicated by the authorities cited by said respondent, in view of the Public Liability Act of 1923, this rule cannot have any controlling force in this state. The statute, as we have already indicated, makes municipalities liable for injuries resulting from dangerous or defective conditions of its public streets under certain conditions set forth in said statute. We find nothing in these conditions which requires any different rule to be applied in a case where the dangerous or defective condition is the result of a plan of construction adopted by the city than in a case where such condition results from the street being permitted to remain out of repair after its construction under some general plan adopted by the municipality. Since the enactment of the Public Liability Act of 1923, numerous cases have been before this and the several District Courts of Appeal in which the municipality has been held liable in damages for injuries arising from the construction of the sidewalk or street when such construction created a dangerous or defective condition in the sidewalk or street. *Rafferty v. City of Marysville*, 207 Cal. 657, 280 P. 118; *Bennett v. Kings County*, 124 Cal.App. 147, 12 P.2d 47; *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 28 P.2d 377.

[1] In the following cases the same question was before the court: *Rodkey v. City of Escondido*, 8 Cal.2d 685, 67 P.2d 1053, and *Wilkerson v. City of El Monte*, 17 Cal.App.2d 615, 62 P.2d 790. While the judgment in each of these cases in favor of the injured party was reversed, the reversals were not on the ground that the alleged dangerous condition in the street resulted from the improper construction, but for the reason that the defect was so trivial as not to charge the city with constructive notice of its dangerous character. We, therefore, find nothing in the Public Liability Act of 1923, or in any of the cases decided since its enactment, which justified the contention of the respondent city that in cases arising under said statute, where the injuries are caused by reason of the defec-

tive construction of an improvement under a general plan adopted by the city, the latter is not liable unless the plan adopted is arbitrary and palpably dangerous beyond all reasonable doubt.

[2-5] The rule adopted by the courts of this state is that while a municipality is not an insurer of the safety of travelers on its streets, the duty is imposed upon it by the Public Liability Act of 1923 to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. *Rodkey v. City of Escondido*, supra; *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725; *Waldorf v. City of Alhambra*, 6 Cal.App.2d 522, 45 P.2d 207; *Beeson v. City of Los Angeles*, 115 Cal.App. 122, 300 P. 993, and *Brooks v. City of Monterey*, 106 Cal.App. 649, 290 P. 540. While as a general proposition the acquisition, construction, maintenance and repair of roads and streets are undisputed functions of the government, and a municipality reserves the right to change its street improvement system when it is reasonably wise to do so, yet if in the discharge of this function or in the exercise of this right, it creates "a dangerous and defective condition in its public streets, it is liable for any "injuries to persons or property resulting from" such condition provided it had knowledge of such condition and failed or neglected to remedy said condition for a reasonable time after acquiring such notice. This is the construction placed upon the Public Liability Act of 1923 by the courts in *Rafferty v. City of Marysville* and kindred cases cited above. This liability is one for negligence (*Whiteford v. Yuba City Union High School Dist.*, 117 Cal.App. 462, 464, 4 P.2d 266; *Brooks v. City of Monterey*, 106 Cal.App. 649, 654, 290 P. 540), and the question of the municipality's negligence is for the determination of the jury. *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P.2d 952.

[6] It is contended by the respondent city that this conclusion gives to the jury, or to the trial court when the case is tried without a jury, the right to pass upon the discretion of the municipal authorities to adopt a system or general plan of improvement of its streets, sidewalks, or other public works. We do not consider that our conclusion goes to that extent. We simply hold that under the statute the municipality is liable for injuries resulting from the dangerous or defective condition of its public street, whether such condition arises from the construction of said street in the first in-

stance, or is due to a defect created therein after its construction.

Great reliance is placed by the respondent City of Los Angeles upon the two recent cases of *Waldorf v. City of Alhambra*, supra, and *Robertson v. City of Long Beach*, 19 Cal.App.2d 676, 66 P.2d 167. In each of these cases the injury was caused by a collision of an automobile with a "jog" or "offset" in the street along which the automobile was being operated. It was held in the *Waldorf* Case, and followed in the other cited case, that there is no law of this state which requires a municipality to maintain barriers or warning devices at "jogs" or "offsets" in the streets of the municipality; that in almost every city of size in the state, some streets are laid out and improved without uniformity as to width or direction, resulting in "jogs" or "offsets" and that where there is nothing in the construction of such a street to conceal its real condition, no liability attaches to the municipality for injuries arising out of such construction.

[7,8] The factual situation in each of these two cases differs materially from that existing in the present action. It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923, each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases. *Rafferty v. City of Marysville*, supra, at page 660, 280 P. at page 119; *Waldorf v. City of Alhambra*, supra, at page 526, 45 P.2d at page 208; *Hook v. City of Sacramento*, 118 Cal.App. 547, 5 P.2d 643. In each of the *Waldorf* and *Robertson* Cases, as we have seen, the claimed dangerous condition was a "jog" or "offset" in the street at its intersection with a cross-street, where the abutting property extended beyond the property line on the opposite side of the cross-street. The abutting property was surrounded by a curb some six inches in height, and there was also a sidewalk and parkway within the curb line. These, the court held, constituted barriers or warnings sufficient to avert disaster and readily visible to the driver of an approaching automobile. The defective and dangerous condition which it is alleged existed in the street involved in the present action was within the street itself. The storm drain was constructed as a part of the street and in the traveled portion thereof. There was no barrier between it and any other part of the street to warn those traveling over the

street of its existence. It was not only lower than the surrounding area of the street, but there was a gradual and somewhat precipitous slope from near the center of the street into the drain, so that the course of one approaching this area from a southerly direction would be diverted toward the curb and into the dip or drain and then against and over the curb. This condition was rendered more dangerous by the gradual narrowing of *Allesandro* street, so that the curb along the easterly side of said street for some distance on either end of the storm drain did not run parallel with the center of the street but inclined in a westerly direction toward the center of the street. Due to this deviation in the curb, if an automobile were forced into the storm drain, it would be much more liable to collide with the curb than if the line of the curb at that point were parallel with the center of the street. This condition in the street was rendered still more hazardous by reason of the insufficient lighting of the street and the change of the color of the material used in the construction of the street from the light colored concrete or cement used southerly of the intersection to the dark asphalt in the intersection and in that portion of *Allesandro* street in which the storm drain is located. By reason of the marked difference in the factual situation in the present case from those shown to have existed in the case of *Waldorf v. City of Alhambra*, supra, and *Robertson v. City of Long Beach*, supra, we are unable to agree with the respondent city that the decisions in those cases are determinative of the issues involved in the instant case. As the complaint in this case set forth facts showing the existence of a dangerous and defective condition in *Allesandro* street, together with notice of such condition by the officers of the city and their failure to remedy such condition, it met all requirements of the statute, and was not vulnerable to a general demurrer. The court, therefore, erred in sustaining said demurrer.

[9] In the complaint it is alleged that the respondent, the Los Angeles Gas and Electric Corporation, constructed, and on the day of the accident maintained, two "telephone" poles on the easterly side of *Allesandro* street and inside and within one foot of the easterly curb line of said street. One of said poles was approximately forty feet northerly of the north line of *Rosebud* avenue and the other was approximately one hundred and forty feet northerly from said

first-mentioned pole. It is further alleged in the complaint "that the maintenance of said poles and each of them in their respective locations was careless and negligent, and they and each of them were carelessly and negligently maintained without markings or warning signs of any kind, and were carelessly and negligently maintained so close to the traveled portion of said Allesandro street as to constitute a hazard to persons traveling by automobile in a northerly direction along said Allesandro street at and near said intersection; that said defendant Los Angeles Gas and Electric Corporation could have and should have reasonably anticipated that because of the hereinbefore alleged dangerous and defective condition of said Allesandro street at and near said intersection, of which condition said last-mentioned defendant had full knowledge, automobiles might be caused to leave the traveled portion of said Allesandro street and strike against said poles, thereby causing injury to person and property; that said defendant Los Angeles Gas and Electric Corporation nevertheless negligently and carelessly maintained said poles and each of them at said respective locations, and negligently and carelessly failed to place thereon or on either of them any markings or warning sign whatever.

In paragraph VI of said complaint, it is alleged that due to the negligence of the two respondents, as in said complaint alleged, plaintiff's automobile "was caused to leave the traveled portion of said Allesandro street and to crash against and collide with said two poles" and by reason thereof plaintiff sustained the injuries for which he seeks in this action to recover damages.

We can see no substantial difference in the factual situation in this case in so far as it relates to the respondent Los Angeles Gas and Electric Corporation, and that set out in the case of *Norton v. City of Pomona and Southern California Edison Co.*, 5 Cal. 2d 54, 53 P.2d 952, in which the Edison Company was held liable for damages sustained by Mr. and Mrs. Norton when the automobile which they were operating, by reason of a dangerous condition in the street, ran upon and over the curb and crashed into a pole maintained by the Edison Company within but flush with the curb along said street. In sustaining the judgment of the trial court in favor of the plaintiffs in said action and against the Edison Company, we held as follows (page 955): "Herein plaintiffs sued upon the theory of negligence—not that of nuisance—and con-

tend that the city of Pomona negligently permitted a dangerous and hazardous condition of a public street to exist, and that the Edison Company negligently maintained a pole in such dangerous place, the two acts concurrently operating to proximately cause the injuries to plaintiffs. In this case it became a question of fact for the court to determine whether under the circumstances shown the maintenance of the pole and the street, separately or together, constituted negligence on the part of either or both defendants. (*Barrett v. Southern Pacific Company*, supra [207 Cal. 154, 277 P. 481]), and whether such negligence, if any, proximately caused the injuries to plaintiffs, without contributory negligence on their part. The evidence establishing the facts and circumstances herein is such that reasonable minds might draw different and opposite inferences both as to negligence and contributory negligence. The court found that the defendant Edison Company negligently erected and maintained the pole in the place shown; that such placing and maintaining constituted a hazard to the traveling public and caused the happening of the collision; and that there was no negligence on the part of plaintiffs contributing thereto. There was ample evidence to support the conclusions deduced therefrom by the court, and under the well-known rule these findings are binding and conclusive on this appeal and cannot be substituted by any of our own deductions."

Said respondent seeks to distinguish that case from the instant case by pointing out that in the *Norton Case* the pole was flush with the curb while in the instant case the poles were approximately one foot from the curb. This effort, in our opinion, has not been successful. In each case there was a dangerous condition in the street which caused the automobile traveling along the street to leave the main traveled portion thereof and to run upon and over the curb and along the parkway within the curb line. Evidently the automobile after running over the curb would have crashed into the pole whether the pole was located one foot within, or flush with the curb. In the case of *Gerberich v. Southern California Edison Co.*, 5 Cal.2d 46, 53 P.2d 948, the pole into which the plaintiff crashed was located some six feet from the traveled and paved portion of the roadway. Yet the defendant utility company was held negligent in its maintenance. The *Gerberich Case* is strongly relied upon by the appellant, and we think the ruling therein, together with

that found in the Norton Case, fixes a liability upon the respondent Los Angeles Gas and Electric Corporation for the negligent maintaining of said pole in the manner stated in the original complaint. The following additional cases furnish further authority in support of this conclusion: *Stewart v. San Joaquin Light & Power Corporation*, 44 Cal.App. 202, 207, 186 P. 160; *Carroll v. Central Counties Gas Co.*, 74 Cal. App. 303, 307, 240 P. 53; *Lim Ben v. Pacific Gas & Electric Co.*, 101 Cal.App. 174, 179, 281 P. 634; *Barrett v. Southern Pacific Co.*, 207 Cal. 154, 160, 277 P. 481.

The judgment as to each defendant is reversed.

We concur: WASTE, C. J.; EDMONDS, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.



FOWLER et al. v. ASSOCIATED OIL CO.

L. A. 15135.

Supreme Court of California.

March 10, 1938.

Appeal and error ☞1160

A judgment was reversed and cause remanded with directions to dismiss the cause as to all parties, with prejudice, pursuant to stipulation reciting that case was settled out of court.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding between George F. Fowler and others and the Associated Oil Company. From the judgment rendered, Fowler appeals.

Reversed and remanded, with directions. Prior opinion, 74 P.2d 727.

Robert M. Searls and W. F. Kiessig, both of San Francisco, and Harrison Guio, of Los Angeles, for appellant and respondent Associated Oil Company.

Hanna & Morton, Byron C. Hanna, Harold C. Morton, and Leon B. Brown, all of Los Angeles, for appellants and respondents.

PER CURIAM.

Pursuant to stipulation filed this day, reciting that the above entitled case has been settled out of court, it is hereby ordered that the judgment of the Superior Court of Orange County in said cause be and the same is hereby reversed and the cause remanded to the Superior Court of Orange County with directions to dismiss said cause as to all parties, with prejudice, each party to bear its own costs. Remittitur forthwith.



26 Cal.App.2d 461

WOOLLOMES v. GOMES.

Civ. 2215.

District Court of Appeal, Fourth District, California.

May 19, 1938.

1. Bills and notes ☞134

Where after execution of note makers agreed to make monthly payments to be applied on principal and interest, the rights of the makers and payee's assignee were measured by the note and the agreement when read together.

2. Limitation of actions ☞13

Where a creditor has been induced by debtor to forbear suit until creditor's right of action is barred by statute, the debtor will be estopped from claiming that the action is barred.

3. Limitation of actions ☞67

Where one whose right to sue is subject to no greater obstacle than a requirement that he give 10 days' notice in advance and it appears that he might, at his mere volition, have given it at any time within a period of years from some ascertainable date, if he delays for an unreasonable time, his right to sue will be treated as having in effect both accrued and lapsed.

4. Limitation of actions ☞67

Where on June 16, 1927, payee of note agreed to forbear instituting action so long as monthly payments of \$50 each were made between first and tenth days of month and to give 10 days' notice before resorting to legal action on default, payments aggregating \$380 were made and 10 days' notice of intention to institute legal action was given on May 22, 1937, action commenced on June

22, 1937, was barred by 4-year statute of limitations since the agreement of June 16, 1927, was breached at least not later than February 10, 1928, so that failure to give notice for a period of 9 years, 3 months, and 12 days was unreasonable. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Clarence Woollomes against A. Gomes on a promissory note. Judgment for defendant, and plaintiff appeals.

Affirmed.

John Preston King, of Lindsay, for appellant.

Halbert & Stone, of Porterville, for respondent.

HAINES, Justice pro tem.

On August 30, 1926, defendant and respondent A. Gomes executed and delivered to one Luther Davis, who is the assignor of plaintiff and appellant Clarence Woollomes, a promissory note for \$700 and interest payable by its terms six months after date, with reasonable attorneys' fees in case of suit. On June 16, 1927, Davis, as party of the first part, and respondent, as party of the second part, entered into a mutual agreement in writing reciting that there then remained an unpaid balance of principal and interest on the note amounting to \$609.70; that respondent would then and there pay to apply thereon \$125, receipt whereof Davis acknowledged, and that respondent would thereafter pay \$50 per month between the first and the tenth days of each month to apply on the indebtedness until both principal and interest should have been fully satisfied. The agreement contained inter alia the following language:

"That in consideration of the payments above mentioned, party of the first part covenants that he will not commence legal action upon the promissory note above mentioned; but will credit each and every payment thereon, giving interest due the preference in said credit.

"It is understood and agreed that in the event that second party shall fail to make the payments above mentioned at the time agreed upon therefor, that party of the first part shall no longer be obligated under this instrument, and may then, upon ten days notice to party of the second part

resort to any legal action for the collection of said note, that he may be entitled to by virtue of law; that any and all payments made upon said contract shall first be credited to said note, prior to the commencement of legal action."

The agreement recited that as additional consideration for the contract Davis had received from respondent the sum of \$1.

Appellant, as plaintiff, commenced the present action on June 22, 1937, setting up the above-mentioned note and the agreement of June 16, 1927, alleging subsequent payments on account, amounting to \$380, and stating in the amended complaint that on May 22, 1937, pursuant to the contract, Davis had notified the respondent in writing that, unless the indebtedness were paid in ten days, legal action would be commenced, and that thereafter Davis had assigned the note and his rights under the contract to appellant, that payment had not been made and that there remained due and unpaid \$229.70 on the principal besides interest, together with \$100, alleged to be the amount of appellant's reasonable attorney's fees, for all of which recovery was sought. Respondent demurred to the amended complaint, setting up the bar of subdivision 1 of section 337 of the Code of Civil Procedure, and, his demurrer having been sustained without leave to appellant to further amend, judgment was entered in his favor and it is from this judgment that the present appeal is taken. Appellant's contention, as stated in his opening brief, is that: "The plaintiff in this action waived his legal right to commence suit upon the delinquent note. And thereby the defendant impliedly waived the limitations of action."

And again: "It is clear that plaintiff waived his legal right to commence suit upon the delinquent note until the happening of a certain contingency, that is, giving ten days notice in writing. We maintain that this is an implied agreement on the part of defendant that he will waive the limitations of action. And the forbearance to sue was at the request of the defendant."

Obviously, by "plaintiff" what appellant means is "plaintiff's assignor".

[1] There has been considerable discussion in the briefs as to whether the instant action is upon the note of August 30, 1926, or the agreement of June 16, 1927. Manifestly, the correct statement of the situation is that it is upon the former, as modified by the latter, or in other words, that the rights of the parties are measured

by the two instruments when read together.

[2] Cases frequently arise where debtors are, by reason of their conduct, estopped to set up the statute of limitations. In *Roper v. Smith*, 45 Cal.App. 302, 305, 306, 187 P. 454, 455, the court said:

"It is no doubt well settled that, where a party has been induced by the debtor to forbear suit until his right of action is barred by the statute, the latter will be estopped to say that the action is brought too late (1 Woods on Limitations, § 76); and in this state an even more liberal rule has been recognized, viz., that 'If, pending the running of the statute, the time of payment is extended by the creditor, with the assent of the debtor, the statute does not run during the time of the suspension.' State Loan, etc., Co. v. Cochran, 130 Cal. 245, 62 P. 466, 600; *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344. In each of these cases the forbearance was for a definite agreed time, and the period of limitations was held to be extended in the same measure. And this suspension of the statute is held to arise by virtue of the principle of equitable estoppel, the delay in bringing suit, and the consequent jeopardy to the interests of the creditor, being attributed by the law to the action of the debtor, of which he may not take advantage.

"In the case at bar there was no definite period that the creditor agreed to forbear, but as there was a valuable consideration given for such forbearance the law would imply that it must be for a reasonable duration."

So far as this doctrine is concerned, however, we deem it inapplicable to the instant case. Though the contract of June 16, 1927, be treated as having been made for valuable consideration moving to appellant's assignor, Davis, yet Davis was not, by its terms, obligated to forbear insisting on the payment of all or any part of respondent's obligation, after delinquency, otherwise than by allowing the above-mentioned ten days to elapse after the notice to be given by himself. To be sure, he did agree to forbear so long as the monthly payments of \$50 each continued to be punctually made, and further agreed that if any default occurred in making them he would resort to no legal action without giving ten days notice to respondent of his intention to do so. As pointed out in respondent's brief, however, to have made the payments aggregating \$380 referred to in the

amended complaint as having been made after he entered into this contract, respondent would have had to make the equivalent of seven full payments, the first of which would be due under the terms of the contract not later than July 10, 1927, plus one payment of \$30, which would apply upon but not satisfy the eighth full payment required; and since any failure to make a full payment on time would amount to a breach on his part of the contract he must have breached it at a date which respondent describes as not later than March 10, 1928, but which, according to our calculation, must have been not later than February 10, 1928. Treating the contract of June 16, 1927, as having sufficiently modified the terms of the note so that the time when the statute of limitations began to run is to be considered with reference to the terms of the contract rather than with reference to the original terms of the note, it is still patent that the four years allowed by subdivision 1 of section 337 of the Code of Civil Procedure for commencing an action would have expired with February 10, 1932, unless further time were allowed in consequence of the requirement of the ten days' notice. We must next consider, therefore, the effect of that requirement.

Our attention is, in that connection, called to a somewhat comprehensive statement in 16 California Jurisprudence 492-494, as follows:

"It has been said that a distinction may well be drawn, so far as the statute of limitations is concerned, between cases in which a demand is merely a preliminary requirement to the bringing of suit, and those in which a demand is a condition precedent to a right, as to a right to a return of property. Where a right has fully accrued except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. Since a creditor is able at any time to bring an action when he can by his own act fix the time of payment, it is no stretch of language to say the cause of action accrues for the purpose of setting the statute in motion as soon as he, by his own act and in spite of the debtor, can make the demand payable.

"Where a demand is an integral part of a cause of action, the statute of limitations

does not run until demand is made. The plaintiff cannot, however, indefinitely suspend the running of the statute by delaying to make a demand. The general rule is that where an actual demand is necessary to perfect a right of action and no time therefor is specified in the contract, such demand must be made within a reasonable time after it can lawfully be made. What is a reasonable time depends upon the circumstances of each particular case; but in the absence of peculiar circumstances, a time coincident with the running of the statute will be deemed reasonable, and if a demand is not made within that period, the action will be barred."

The cases cited in the article from which we have just quoted in support of the propositions there laid down are too numerous to be discussed in detail here. Suffice it to say of them that, speaking generally, they support the text.

Appellant's position in the instant case, as we understand it, is, in brief, that (a) no cause of action could accrue until the assignor Davis gave the ten-day notice; (b) that the four years allowed by subdivision 1 of section 337 of the Code of Civil Procedure for filing the action did not, therefore, begin to run until the notice was given; and (c) that, since the notice was not given until shortly before the action was filed, it was filed well within the time allowed. Manifestly, however, unless the first of these three propositions is correct, all three are untenable, and we do not agree that the first of them is correct. It is true, as counsel for appellant urges, that a distinction is drawn, so far as the limitation of actions is concerned, between cases in which a demand is merely a preliminary requirement to the bringing of an action and those in which a demand is a condition precedent to a right. *White v. Costigan*, 138 Cal. 564, 72 P. 178; *Gamewell F. A. T. Co. v. Los Angeles*, 45 Cal.App. 149, 187 P. 163; *Kaplan v. Reid Bros., Inc.*, 104 Cal.App. 268, 285 P. 868; *Rossi v. Jedlick*, 115 Cal. App. 230, 1 P.2d 1065. However, the two situations tend to shade into each other, and, as is illustrated by the present case, the line of demarcation is not always a clear one, and there is some danger of giving to merely formal differences an undue importance.

[3,4] Where one whose right to sue is subject to no greater obstacle than a requirement that he give ten days' notice in advance, and it appears that he might, at

his mere volition, have given it at any time within a period of years from some ascertainable date (in this case following a date at least as early as February 10, 1928), we do not believe that the accrual of his cause of action can be said to be indefinitely suspended for years, which might readily run into decades, pending the time he may choose to give the notice. If, in such circumstances, he delay for an unreasonable time, his right to sue ought, in consequence, to be treated as having in effect both accrued and lapsed. In the present case appellant actually took all the time that elapsed between at least as early a date as February 10, 1928, and May 22, 1937, when, according to his amended complaint, the notice was actually given, a period of nine years, three months and twelve days. If he had served his notice at any time within, say the five years next following the time when his right to serve it must have accrued, the further four years limited by section 337, subdivision 1, of the Code of Civil Procedure for commencing his action, would still have expired well before the time when he actually commenced it. It is not for the purposes of the present case necessary to decide precisely what time Davis might reasonably have been allowed within which to give his ten-day notice. We need only say that even if he had waited to serve it for most of the five years above referred to, his delay would have been manifestly unreasonable. He did not even serve it within any such period at all and it must in the circumstances be held that his right of action has been long since barred.

These views we think are supported by what was said in *Bass v. Hueter*, 205 Cal. 284, 270 P. 958, which seems to us to be directly in point. There, by the terms of a note, the obligor had agreed to pay the same "three months after notice after one year from date." The giving of the notice was delayed somewhat over 19 years after the date when it might have been given. It was held (we quote from the syllabus) that:

"When the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no disability or restraint in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will

begin to run after the lapse of such reasonable time; and unless there are peculiar circumstances affecting the question, a reasonable time is a period coincident with that provided in the statute of limitations for barring the action."

The court distinguished the cases of *Neale v. Morrow*, 150 Cal. 414, 88 P. 815, and *Vickrey v. Maier*, 164 Cal. 384, 129 P. 273, saying of them, page 290, 270 P. page 960: "In each case the general rule which we conclude is applicable to the present case was recognized, but it was determined that from the form of the documents themselves it was in the contemplation of the parties that the time of payment should be indefinitely postponed."

There is nothing in the instant case to indicate to us that any such indefinite postponement was here contemplated. We think it, therefore, to be merely another situation calling for the application of the general rule as declared in *Bass v. Hueter*, supra.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 496

PEOPLE v. ELLISON.

Cr. 3085.

District Court of Appeal, Second District,
Division 2, California.

May 23, 1938.

1. Criminal law ⇨198

Indictment and Information ⇨130

An indictment, charging in several counts that defendants presented schedule of conditional sales contracts to one induced by false representations therein to pay defendants stated sums on three different dates, was not bad as making simple transactions basis of several counts, thus constituting double and triple jeopardy. Pen.Code, § 484.

2. False pretenses ⇨52

Instructions to convict defendants of grand theft, if they conspired to obtain money by false and fraudulent representa-

tions and pretenses and obtained sums mentioned by such means pursuant to and to further objects of conspiracy, and to find defendant, knowingly aiding and abetting co-defendant in fraudulently obtaining funds by such means, guilty on each count, were not erroneous as authorizing convictions without findings that sums mentioned were actually obtained by fraudulent representations. Pen.Code, § 484.

3. Criminal law ⇨1038(3)

Defendant, offering no instructions on conspiracy, is in no position to complain on appeal of trial court's failure to limit instructions on such subject.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Lawrence F. Ellison was convicted of grand theft, and he appeals.

Affirmed.

Mark L. Herron and Russell Graham, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jesse J. Frampton, Deputy Dist. Atty., both of Los Angeles, for the People.

WOOD, Justice.

An indictment was filed charging appellant, Lawrence F. Ellison, his wife, Mae C. Ellison, and Peggy L. Nutting with grand theft. Eighteen separate counts were contained in the indictment. At a jury trial all of the defendants were convicted on all counts. Defendants Mae C. Ellison and Peggy L. Nutting were granted probation and defendant Lawrence F. Ellison prosecutes this appeal from the judgment of conviction.

Under the name of Southern Piano Company defendants were engaged in the business of retailing household furniture and appliances on conditional contracts of sale. Later the business was conducted under the name of Sales Acceptance Corporation, successor to Southern Piano Company. When articles of merchandise were sold to purchasers upon conditional contracts of sale defendants followed the practice of attaching schedules to the contracts and assigning them as collateral security for the loan of money to defendants by banks, finance companies and individuals. In assigning the contracts defendants warranted that they

were executed in connection with the sale of merchandise which had been delivered to the purchasers. Defendants caused false and forged contracts to be prepared evidencing ostensibly the legitimate sales of household furniture and appliances to purchasers, and these were hypothecated with the various lenders upon the false representations, among others, that they were genuine. In some of the transactions defendants issued several contracts on the same piece of merchandise bearing the same serial number, each contract purporting to be an original, and sold them to different parties. Appellant concedes that the evidence is sufficient to sustain the verdicts on all counts except count XIII. On this count defendants were charged with the theft of \$600 on September 26, 1936, from one Riddell. The record discloses that a check was given to defendants by Riddell on September 22, 1936, in the sum of \$600 under conditions similar to those surrounding charges contained in the other counts. The evidence is amply sufficient to sustain the convictions on all counts.

[1] Appellant argues that "simple transactions were made the basis of several counts in the indictment, thus constituting double and triple jeopardy." We find no merit in this contention. On July 10, 1936, a schedule of contracts containing false representations was presented to one Slaff. Influenced by these false representations Slaff paid to defendants the sum of \$1,000 on July 10, the sum of \$1,204.27 on July 14 and the sum of \$553.75 on July 20. The false representations were made on only one occasion, but they provided the inducement for the payment by Slaff of three sums of money on three separate occasions. It is provided in section 484 of the Penal Code that "any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question." The obtaining of three sums on different dates constituted three separate acts. The fact that the three sums were obtained from the same party and on the same representations does not reduce the three separate acts to one act. Appellant had the fraudulent intent to obtain property by false representations, and the obtaining of the property on the first occasion under the inducement of false repre-

sentations constituted a complete crime. When at a later date other property was obtained under the influence of the fraudulent representations which had earlier been made a separate offense was committed. *People v. Rabe*, 202 Cal. 409, 261 P. 303.

[2,3] Appellant also complains of the action of the trial court in giving instructions to the jury. The court instructed the jury at length on the fundamental rules of law covering the charges contained in the indictment, among the instructions being a number on the subject of conspiracy. The following instructions were given by the court: "If you believe from the evidence and beyond a reasonable doubt, that defendants L. F. Ellison, Mae C. Ellison and Peggy Nutting prior to the dates alleged in the indictment entered into a conspiracy to obtain money by means of false and fraudulent representations and pretenses, with intent to cheat and defraud, and thereafter and on or about the dates mentioned in Counts I to XVIII of the indictment, pursuant to said conspiracy and to further the objects and purposes thereof, said defendants, or any of them, did obtain the sums of money mentioned in said indictment by means of false and fraudulent representations and pretenses, with intent to cheat and defraud the persons named in the indictment, then you will find all of said defendants guilty upon all counts charged." "If there is reasonable doubt in your minds as to the existence of a conspiracy to cheat and defraud as herein defined between defendants L. F. Ellison, Mae C. Ellison and Peggy Nutting, but you do find from the evidence and beyond a reasonable doubt that on or about the dates mentioned in Counts I to XVIII of the Indictment, one of said defendants did obtain the money therein mentioned by means of false and fraudulent representations and pretenses, with intent to cheat and defraud the person or persons therein named, and said defendant was aided, assisted and abetted by one or more of his or her codefendants in so fraudulently obtaining said funds, then you will find such defendant or codefendant, as the case may be, guilty upon each count wherein you find he or she knowingly aided, assisted and abetted the other in so fraudulently obtaining said funds." The court also instructed the jury on the subject of aider and abettor.

Appellant concedes that it was proper for the court to instruct the jury on the subject of conspiracy and that the instructions actually given were correct statements of the

law but he complains that the instructions should have been limited; that the jury might have concluded from the instructions actually given that defendants could be convicted by proof of a conspiracy and an overt act without the actual consummation of the specific crime charged. We find nothing in the instructions above quoted or in other instructions given which authorized the jury to return verdicts of conviction without findings on their part that the sums of money mentioned in the indictment were actually obtained by the fraudulent representations. Moreover, appellant is not now in position to complain of the failure of the trial court to limit the instructions on the subject of conspiracy in the manner indicated. He did not offer any instructions upon the subject of conspiracy. If he wanted to have the jury instructed upon the specific point mentioned in his brief he should have requested the trial court to give the instruction desired. *People v. Allen*, 138 Cal.App. 652, 33 P.2d 77; *People v. Miller*, 97 Cal. App. 179, 275 P. 482.

The judgment is affirmed.

We concur: CRAWL, P. J.; McCOMB, J.



26 Cal.App.2d 519

CALISTOGA NAT. BANK v. CALISTOGA VINEYARD CO., Limited, et al.

Civ. 5846.

District Court of Appeal, Third District,
California.

May 24, 1938.

Rehearing Denied June 23, 1938.

I. Evidence ⇨75

In action on note by bank, wherein makers counterclaimed for amount of forged checks paid by bank and charged to makers' account and testified that they discussed such claim with bank officer, reviewing court could assume that testimony of officer, who was available to bank as a witness but was not called, would have been adverse to bank.

2. Appeal and error ⇨1097(1), 1195(1)

In action on note by bank, wherein makers counterclaimed for amount of forged checks paid by bank and charged to makers'

account, evidence at first trial and at second trial following reversal of judgment rendered at first trial was not in substantial conflict, and hence both trial court and reviewing court, at second trial and on appeal therefrom, were bound by former judgment of reviewing court, as establishing the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Limitation of actions ⇨148(1)

Where bank charged amount of forged checks to account of makers of demand note for greater amount, which note was held by bank, makers requested adjustment, and bank refused to make adjustment without payment of note, and, within period of one-year limitation on action for amount of checks, stated that checks would be considered on payment of note, limitation was suspended, and did not bar makers' counterclaim in action on note, brought over one year after cause of action for amount of checks arose. Code Civ.Proc. § 340, subd. 3.

Appeal from Superior Court, Napa County; Donald Geary, Judge.

Action on a note by the Calistoga National Bank against the Calistoga Vineyard Company, Limited, and others, wherein a counterclaim was filed. From a judgment for plaintiff, defendants appeal.

Reversed, with directions.

King & King, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment on the retrial of an action resulting in a reversal of the former judgment. 7 Cal.App.2d 65, 46 P.2d 246. The facts generally upon which this appeal is based will be there found, and we need not again set them forth at length.

In that opinion we held that the trial court erred in sustaining objections to the effort on the part of the vineyard company to prove their affirmative defense of equitable estoppel. We also held that the trial court erred in finding that the plaintiff did not agree to "take into consideration" the forged checks when the note was paid, the

evidence being uncontradicted to the effect that the bank did promise so to do, and that the finding to the contrary was not supported by the evidence. This court also implied that if the statement was relied upon by the vineyard company that the bank would take into consideration the forged checks when the note was paid, the bank would be estopped from setting up the statute of limitations as a defense. For the reason, therefore, that the vineyard company was precluded in the first trial from introducing evidence in support of its affirmative defense of equitable estoppel by waiver of the statute of limitations for the commencement of an action to recover the sum of the forged checks, and by the finding by the court that the counterclaim was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, the judgment was reversed. We now have before us for consideration the second trial following such reversal.

The trial judge in the retrial of the action, among other things, found that the plaintiff bank had charged certain checks totaling \$850 against the defendants' account in plaintiff bank, and had withdrawn funds to that amount from the bank account of defendants, and found that the signatures of defendants to said checks were forged.

The court further found that it was not true, however, that the plaintiff banking company had promised or agreed to credit the amount of these checks to defendants, or that it had promised or represented to defendants that the question of said forgeries would be taken into consideration at such time as defendants should tender payment of the balance under a promissory note given by the vineyard company to the bank, and in accordance with that finding also found that defendants were not entitled to a set-off by way of counterclaim for the amount of said notes, and also found that the counterclaim was barred by the statute of limitations.

At the conclusion of the present trial, the judge presiding filed an opinion, reciting the facts as he found them, and came to the conclusion that the judgment of the Appellate Court on the first appeal did not establish the law of the present case, owing to the fact that the testimony was not the same at the former trial.

The difference in testimony, if any, has to do largely with certain conversations had between the officers of the two corpora-

tions here involved. At the first trial Mr. Forni testified, as found in the opinion of the court, that:

"Mr. Westover (cashier and vice-president of plaintiff bank) told him 'he would off-set the amount of * * * these checks against the amount on your checks'. He later testified that Mr. Westover said, 'he didn't know just what the bank's attitude would be toward * * * these forged checks'; that Westover then urged him to pay their note, and said 'the minute we were ready to take care of this \$4,000.00 note that he would take the other matter into consideration.'"

In this trial defendant Forni testified upon direct examination concerning the same conversation held January 5, 1931, when he and his partner Bianchi went to the bank to discuss the forgeries, as follows:

"At the end he (Westover) mentioned our \$4000.00 note and he said when we were ready to pay the note he would take the \$850.00 into consideration. We asked him to reimburse us, and to the best of my memory he said he didn't know just what attitude they could take about the \$850.00 checks. Rocca came in at the end of the conversation, but he didn't say anything."

Mr. Bianchi testified at this trial in regard to the same conversation held on January 5th, as follows:

"Charles (Forni) told Westover, Bower had forged these checks for \$850.00 and asked if the bank would make good. Westover said that when our note for \$4000.00 was taken up he would take the \$850.00 into consideration. We never took any steps to collect the \$850.00 from the bank because I relied upon Westover's promise."

In substance the testimony of the two witnesses as to this conversation is the same at the second trial as at the first. Some questions also arose as to whether or not Mr. Rocca, president of the bank, was present during the foregoing conversation. At the first trial Mr. Rocca first testified that he was present and overheard the conversation between Forni and Westover. Later, however, at that trial, Mr. Rocca testified: "I was not present at the conversation on January 5, 1931, between Mr. Bianchi, Mr. Forni and Mr. Westover."

In this trial Rocca testified that when the conversation first began he was checking over some notes, but later returned to his desk about ten or twelve feet from the desk where Mr. Westover, Mr. Bianchi and

Mr. Forni were discussing the note, and that he was at his desk not over from three to five minutes, and that he did not hear the commencement of the conversation. He testified, however, that he heard nothing said by Mr. Westover in regard to taking into consideration the amount of the forged checks in any adjustment of the balance due on the promissory note.

[1, 2] It is to be noted that at the former trial Mr. Westover, although the cashier and vice president of the bank and the officer with whom defendants claimed to have discussed the adjustment, was not called as a witness, and that before the second trial Mr. Westover was dead. Mr. Westover was a witness available to the bank, and we have the right to assume that his testimony would have been adverse if he had been called. In view of the various conflicting statements made by Mr. Rocca his testimony is not of the strongest, and also inasmuch as he stated he heard only three to five minutes of the end of the conversation, it in no way contradicts the statements of Mr. Forni and Mr. Bianchi that Mr. Westover did state that he would take into consideration the amount of the checks, which still leaves undisputed the statement of Bianchi and Forni that the cashier, Mr. Westover, that he would take into consideration the forgeries. We are of the opinion that there is no substantial conflict in the evidence between the first and second trials.

The only point on the retrial was whether or not the evidence introduced to establish the fact that the defendants relied upon the statements of Mr. Westover that the amount would be taken into consideration was sufficient to establish that fact. Our former opinion found that the conduct and representations of the bank were sufficient to estop it, if defendants could establish the fact that the defendants did rely thereon, thus leaving it only to be ascertained whether or not in the present case such evidence has been adduced.

Here we find the uncontradicted testimony of both defendants that they did rely upon the statements of Mr. Westover that as soon as they were able to pay the note

the checks would be taken into consideration.

We have but to examine the circumstances here to appreciate the fact that defendants were in a difficult position and were, as a matter of fact, compelled to rely upon the statements of the bank. They were indebted to the bank in the sum of \$4,000, payable on demand. They claimed the bank owed them \$850 on forged checks, which had been paid by the bank. The bank informed them that they were in default in the sum of \$4,000 and that the note must be paid. We may assume that the defendants were unable to pay the amount demanded or the note would have been taken up. Therefore, they were in a position where they were compelled either to accept the proposition of the bank, that when they were able to pay the \$4,000, the bank would then consider the off-set of the forged checks, or in lieu thereof have the bank commence an action against them with its resultant injury to their credit and business standing.

[3] It no place appears in the record that the bank refused absolutely to pay the amount of the forged checks. The fact that the bank stated it would, at the time of the payment of the note, take into consideration the forged checks, was sufficient to suspend the running of the statute of limitations. The bank questioned whether or not the checks were forgeries, but that matter has been found against the bank in both this and in the former trial.

We believe that sufficient has been said without going into an analysis of the authorities cited by both parties, the determining issue from our point of view whether or not the previous appeal, on substantially the same facts, established the law of the case. We are of the opinion that both this court and the trial court are now bound to accept the law as then established.

The judgment is reversed, and the court is directed to enter judgment in favor of plaintiff in the sum of \$233.68, without interest.

We concur: THOMPSON, J.; PLUMMER, J.

26 Cal.App.2d 513

PEOPLE v. ROSE.

Cr. 3089.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1938.

Hearing Denied by Supreme Court
June 23, 1938.

1. Indictment and Information ⇨120

Language, in an amended information charging violation of State Narcotic Act, stating that preparation of opium in defendant's possession contained "more than two grains of opium to the avoirdupois ounce," was surplusage and of no legal effect, since act does not permit sale or possession of preparations containing opium in any amount except under certain stated conditions. St.1929, p. 380, as amended.

2. Criminal law ⇨254

In prosecution for violating State Narcotic Act for possessing a preparation of opium, whether defendant innocently and in good faith purchased suppositories found to contain opium at an established pharmacy on pharmacist's recommendation for treatment for hemorrhoids, or whether he obtained them from his codefendant, was for trial court sitting without a jury. St.1929, p. 380, as amended.

3. Criminal law ⇨260(11)

The findings of a jury or of a judge sitting without a jury on disputable fact questions or inferences, or both, must be given full faith and credit, and it is only where, as a matter of law, there is no legal evidence supporting the charge, that a reviewing court may disturb a verdict or decision.

4. Criminal law ⇨260(11)

On appeal in a criminal case, the reviewing court must assume, in favor of the verdict or decision, the existence of every fact which jury or judge could have reasonably deduced from the evidence, and then determine whether or not guilt is deducible therefrom.

5. Criminal law ⇨1159(2)

The question for the reviewing court to pass on in a criminal case is whether there were facts before jury or judge to justify an inference of guilt.

6. Constitutional law ⇨81

A police measure must fairly tend to accomplish the purpose of its enactment and

must not go beyond the reasonable demands of the occasion, but a large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary to protect those interests.

7. Criminal law ⇨1202(1)

Statutes providing that, on conviction for a second or subsequent offense against the laws, punishment shall be one of greater severity, are sustained on ground that punishment is awarded for second offense only, and that, in determining the amount or nature of the penalty to be inflicted, the Legislature may require the courts to take into consideration defendant's persistence in his criminal course.

8. Criminal law ⇨1202(1)

When a person has proved himself immune to the ordinary modes of punishment inflicted on first offenders, it becomes the government's duty not only to seek some other method to curb his criminal propensities that he might not continue to further inflict himself on law-abiding members of society, but as well, by example, to deter others in like situations from committing second offenses.

9. Criminal law ⇨1201

The provision of the State Narcotic Act, making a state prison sentence mandatory in the case of any person convicted thereunder who shall have suffered a prior felony conviction, is not unconstitutional as unreasonable, discriminatory, and an arbitrary exercise of legislative discretion. St. 1935, p. 2208, § 7.

10. Criminal law ⇨1023(10)

An appeal from a sentence does not lie.

Appeal from Superior Court, Los Angeles County; Arthur Crom, Judge.

Ray D. Rose was convicted of violating the State Narcotic Act, St.1929, p. 380, as amended, and he appeals from the judgment, sentence, and order denying his motion for a new trial.

Attempted appeal from sentence dismissed, and judgment and order affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

WHITE, Justice.

In an amended information appellant and one John Radcliff were jointly charged with a violation of the State Narcotic Act, St.1929, p. 380, as amended, for having in their possession a preparation of opium containing "more than two grains of opium to the avoirdupois ounce." It was also alleged that prior to the commission of the substantive offense charged, appellant had suffered a prior conviction in the United States District Court for violation of the Harrison Narcotic Act, 26 U.S.C.A. §§ 1040-1054, 1383-1391, and that pursuant to judgment therein pronounced he served a term of imprisonment therefor in a federal prison.

[1] The language in the amended information in this case to the effect that the preparation of opium contained "more than two grains of opium to the avoirdupois ounce", being beyond and without the provisions of the State Narcotic Act, was merely surplusage and of no legal effect. *People v. Handley*, 100 Cal. 370, 34 P. 853. The act does not permit the sale or possession of preparations containing opium in any amount, except under certain stated conditions.

After trial before the court sitting without a jury, defendant Radcliff was acquitted, while appellant was convicted of the crime charged, and the court further found for the prosecution on the issue of the prior conviction. From the judgment, sentence, and the order denying his motion for a new trial, appellant prosecutes this appeal.

Briefly, the facts are that on the evening of November 18, 1937, police officers arrested defendant Radcliff. While they were questioning him, appellant came into the room and was placed under arrest. A search of appellant by the officers revealed five suppositories in his right-hand leather jacket pocket. At the trial a police department chemist testified that he held one of the suppositories taken from appellant over a gas flame and smelled the odor of opium. He also testified that he was present when another city chemist took another of the suppositories and melted it over a gas flame in a test tube, and he recognized opium in the bottom of the tube. This witness, qualified as an expert, gave it as his opinion that the suppository contained more than twenty grains of opium to the avoirdupois ounce. With reference to the prior conviction, defendant took the stand

in his own behalf and admitted that he had been previously convicted of violating the Harrison Narcotic Act in the federal court as charged in the amended information.

At the oral argument of this cause, appellant abandoned his claim that the trial court erred in permitting the amended information to be filed, and also conceded the sufficiency of the evidence to sustain a conviction in so far as the presence of opium in the suppositories was concerned. Appellant also admitted at the oral argument that the repealing sections of the State Poison Act adopted in 1937, St.1937, p. 1947, removed therefrom certain sections which it had been contended served to deprive appellant of the equal protection of the laws, in that the provisions previously existing in the Poison Act provided a different penalty from that prescribed for similar offenses set forth in the State Narcotic Act.

[2-5] Therefore, in urging a reversal of the judgment, appellant relies first upon the claim that he did not commit an offense under the State Narcotic Act, for the reason that he innocently purchased a pharmaceutical product in an established drug store; and in that connection, appellant testified that he went to a drug store in the city of Los Angeles and advised the pharmacist on duty that he was suffering from hemorrhoids, and that the pharmacist recommended these suppositories to appellant, whereupon the latter purchased them. In this regard, it is appellant's contention that the Narcotic Act exempts from its penal provisions preparations of the United States Pharmacopoeia and National Formulary, or other recognized or established formula or other remedies sold in good faith for medicinal purposes only, and not for the purpose of satisfying the addiction of a user of narcotics. However, we find in the State Narcotic Act no exemption of any kind in favor of any preparation containing opium in any amount except under certain conditions in connection with sales at wholesale by jobbers, wholesalers and manufacturers to pharmacies, or when such preparation of opium is administered, furnished or prescribed by a duly licensed physician. Needless to say, the transaction here in question does not come within any of these exempted categories.

It is appellant's contention that as the prosecution failed to prove knowledge on

the part of appellant as to the contraband contents of the package, his testimony relating to the manner in which he became possessed of the drugs should have been believed by the judge. There is no merit in this claim. While it is true that appellant testified that he innocently and in good faith purchased the drugs at an established pharmacy, there was also testimony to the effect that at the time of his arrest appellant stated that he had obtained the suppositories from his codefendant, which statement was verified by the latter; while appellant further testified that it was his codefendant Radcliff who had purchased the suppositories at the drug store in the presence of appellant. It is significant that no pharmacist or drug store employee was produced at the trial to corroborate appellant's claim, and also, that appellant admitted to the officers that he was a user of narcotics. The circumstances surrounding the case were such as to reasonably justify an inference of guilt, and the judge was not bound to believe defendant's testimony, but was warranted in concluding from the facts testified to that appellant did not obtain the opium suppositories from a drug store or upon a physician's prescription, and might well have concluded that appellant obtained them from his codefendant. *People v. Neary*, 104 Cal. 373, 37 P. 943. If it were the rule that trial judges or juries must decide cases in conformity with the defendant's testimony, few criminals would ever be convicted. *People v. Hall*, 87 Cal.App. 634, 262 P. 50; *People v. Turco*, 104 Cal.App. 59, 60, 285 P. 349. Further, the findings of a jury or of a judge sitting without a jury, upon disputable questions of fact, or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge, that a reviewing court may disturb a verdict or decision. The rule upon appeal in a criminal case is that the court must assume in favor of the verdict or decision the existence of every fact which the jury or judge could have reasonably deduced from the evidence and then to determine whether or not the guilt of the defendant is deducible therefrom. The question for the appellate court to pass upon is whether there were facts before the jury or judge to justify an inference of guilt. *People v. Tom Woo*, 181 Cal. 315, 184 P. 389; *People v. Hennessey*, 201 Cal. 568, 571, 258 P. 49; *People v. Deysher*, 2 Cal.2d 141, 149, 40 P.2d 259.

[6-9] Finally, appellant contends that the provision of section 7 of the State Narcotic Act, St.1935, p. 2208, making a state prison sentence mandatory in the case of any person convicted thereunder who shall have suffered a prior felony conviction, is unconstitutional, for the reason that such provision is unreasonable, discriminatory and an arbitrary exercise of legislative discretion, in that it "inflicts an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances".

This contention of appellant cannot be sustained. The fact of the former conviction is an element merely in determining the criminality of the second offense. The legislature of this state has said that one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted therefor is solely for the second offense, to which a greater degree of criminality is thus attached. Appellant herein contends that in providing for a mandatory prison sentence in cases where a defendant convicted of violation of the State Narcotic Act has suffered a prior conviction of a felony, the legislature has gone beyond the bounds of reason, in view of the offenses committed. It is true that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion, but nevertheless a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. In criminal cases it must be remembered that the offense is against the state, and it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed. The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course. 8 R.C.L. 271. When a person has proved himself immune to the ordinary modes of punishment inflicted upon first offenders, then it becomes the duty of government not only to seek some other method to curb his criminal propensities, that he might not continue to further inflict

himself upon law-abiding members of society (In re Rosencrantz, 205 Cal. 534, 537, 538, 539, 271 P. 902), but as well, by example, to deter others in like situations from committing second offenses. In enacting that upon conviction for a second or subsequent offense against the laws, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. *People v. Biggs*, 9 Cal.2d 508, 71 P.2d 214; *People v. Dutton*, 9 Cal.2d 505, 71 P.2d 218.

[10] The attempted appeal from the sentence is dismissed, for the reason that there is no such appeal known to our law. *People v. Melendrez*, Cal.App., 77 P.2d 870.

For the foregoing reasons, the judgment and the order by which defendant's motion for a new trial was denied are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.



ATCHISON, T. & S. F. RY. CO. v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al. *

Civ. 10803.

District Court of Appeal, First District,
Division 2, California.

May 6, 1938.

Hearing Granted by Supreme Court
July 5, 1938.

1. Master and servant ⇨204(2), 228(2)

A railroad's liability to its employees for violation of the Federal Safety Appliance Act is absolute and defenses of assumption of risk and contributory negligence are not available. Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11-16.

2. Master and servant ⇨204(1), 228(1)

In actions brought against railroad by railroad's employees to recover for common-law negligence under the Federal Employers' Liability Act, defenses of assumption of risk and contributory negligence are available to railroad. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Appeal and error ⇨1199

In employee's action against railroad for injuries, where Federal Supreme Court held that no liability existed under Safety Appliance Act and that employee's abandonment, in trial court, of action under Federal Employers' Liability Act barred any possible recovery, judgment entered by trial court pursuant thereto was a "final judgment" on the merits, so that trial court was without jurisdiction to order the cause to be set for a second trial or to relieve employee from his abandonment of recovery under the Federal Employers' Liability Act. Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11-16; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Prohibition ⇨5(3)

In employee's action against railroad for injuries, where, after Federal Supreme Court held that no liability existed under Safety Appliance Act and that employee's abandonment, in trial court, of action under Federal Employers' Liability Act barred any possible recovery, trial court ordered cause to be set for a second trial and relieved employee from abandonment of recovery under Federal Employers' Liability Act, railroad was entitled to a writ of prohibition to prevent further proceedings. Federal Safety Appliance Act of 1910, 45 U.S.C.A. §§ 11-16; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Code Civ.Proc. § 1103.

Petition for writ of prohibition by the Atchison, Topeka & Santa Fe Railway Company to restrain the Superior Court of the State of California in and for the County of Contra Costa and A. F. Bray, Judge thereof, from trying certain actions in which petitioner is defendant; plaintiff in that action intervening.

Peremptory writ issued.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for petitioner.

Clifton Hildebrand, of Oakland, for intervenor.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from trying a certain action entitled William W. Scar-

*For subsequent opinion see 86 P.2d 85.

lett v. Atchison, Topeka & Santa Fe Railway Company.

Scarlett, an employee of the defendant company, brought said action to recover damages for personal injuries received when he fell from a ladder on the side of a freight car. The cause was tried and he recovered judgment. An appeal was taken and the facts regarding the happening of the accident are fully set forth in the opinions of the several courts. *Atchison, Topeka & Santa Fe Railway Co. v. Scarlett*, 300 U.S. 471, 57 S.Ct. 541, 81 L.Ed. 748; *Scarlett v. Atchison, Topeka, etc., Ry.*, 7 Cal.2d 181, 60 P.2d 462; *Scarlett v. Atchison, Topeka & Santa Fe Railway Co.*, Cal.App., 43 P.2d 608. Certain further facts should be stated for the purpose of this discussion.

[1,2] The allegations of Scarlett's complaint in said action were stated in a single count. It was his contention, however, that said allegations were sufficient to state two grounds of recovery, as follows: First, for common-law negligence under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; and second, for a violation of the Federal Safety Appliance Act, 45 U.S.C.A. §§ 11-16. As pointed out in *Scarlett v. Atchison, Topeka & Santa Fe Railway Co.*, 7 Cal.2d 181, 60 P.2d 462, the liability for a violation of the Federal Safety Appliance Act is absolute and therefore the defenses of assumption of risk and contributory negligence are not available for any purpose in actions brought thereunder. This is not true, however, with respect to actions brought to recover for common-law negligence under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

After Scarlett had presented his evidence in the trial court, the defendant company started to present its evidence in support of its several defenses, including the defenses of assumption of risk and contributory negligence. Scarlett had testified, "I have never seen any brace rod of that kind or description on any freight car in my life before in switching cars. He had given other equally positive testimony on the same subject. To meet this testimony, the railroad company proceeded to offer evidence to show that Scarlett had worked on hundreds of freight cars equipped in the same manner as the car involved in the accident. Several freight train conductors under whom Scarlett had worked were called for this purpose and one of said con-

ductors was giving his testimony. This testimony was apparently convincing and damaging to Scarlett's cause and there was considerable discussion between court and counsel during its presentation. Counsel for Scarlett stated to the court, "I might do this, if your Honor please, if your Honor will take a short recess, I will consider whether or not we want to base this solely on the Safety Appliance Act and that would certainly rule out all this evidence." Following the recess, counsel stated, "Now if your Honor please, in the light of the discussion that was had before the recess, we have decided so far as the plaintiff is concerned that he is willing to base his case squarely upon the Safety Appliance Act, 45 U.S.C.A., section 11, and the provisions of the law relative to the Safety Appliance Act and we withdraw at this time the instructions proposed to your Honor under section 51, 45 U.S.C.A., as to another act, the Federal Employers' Liability Act and the obligation which is claimed under that act independently of the Safety Appliance Act to supply a safe place to work. Now does that make the issue clear which was suggested before?" Counsel for the company then said, "Let me ask, counsel, are you abandoning your claim for negligence under the Federal Employers' Liability Act?" Counsel for Scarlett replied, "Yes, I am basing the case squarely and flatly under the provisions of the Safety Appliance Act * * * which, of course, eliminates all this evidence as to any claimed or alleged assumption of risk and with that in mind we would ask the court to instruct the jury on the issue now before the jury to disregard the evidence introduced which might in any way bear on the issue of assumption of risk." On the following day, counsel for Scarlett reiterated the foregoing abandonment, objected to further testimony on the issues of assumption of risk and contributory negligence and said objection was sustained. Near the close of the trial, the court instructed the jury, with the approval of counsel for Scarlett, as follows: "You are instructed that during the trial of this case, counsel for plaintiff in open court abandoned plaintiff's claim for negligence under the Federal Employers' Liability Act other than that connected with the Safety Appliance Act, and announced that plaintiff bases his case squarely and flatly under the provisions of the Federal Safety Appliance Act." After the unqualified abandonment by Scarlett of the claim of negligence under the Federal Employers'

Liability Act, a motion was made by the defendant for a directed verdict, which motion was denied.

The United States Supreme Court, in its decision above cited, held in effect that the company had strictly complied with the standards prescribed by the interstate commerce commission in the construction of the ladder in question and that Scarlett could not recover under the provisions of the Federal Safety Appliance Act. It further said (page 543), "In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery." The judgment was reversed and pursuant to the mandate of the Supreme Court of the United States, the Supreme Court of this state made its order on June 10, 1937, as follows: "It is ordered that the judgment appealed from is hereby reversed with directions to the trial court to enter judgment in favor of the defendants in the sum of Five Hundred and Thirty-three Dollars and forty-three cents (\$533.43), and costs on appeal."

Scarlett then filed in the trial court a memorandum of motion to set cause for trial and he also made a motion to be relieved of his abandonment of his alleged ground of recovery for negligence under the Federal Employers' Liability Act. The company resisted both motions. The trial court granted both motions and also entered judgment as directed by the Supreme Court in favor of the company and against the plaintiff for \$533.43 and the costs on appeal.

It is apparently conceded by the parties that the decision of the Supreme Court of the United States finally and conclusively determined that there could be no liability imposed upon the company under the provisions of the Federal Safety Appliance Act. The question presented is whether the trial court had jurisdiction to make its orders setting the cause for a second trial and relieving Scarlett from his abandonment of the alleged ground of recovery under the Federal Employers' Liability Act.

[3, 4] Petitioner contends that the respondent court was without jurisdiction to make said orders and in our opinion this contention must be sustained. A reading of the decision of the United States Supreme Court and of the order of the Supreme Court of this state made pursuant to the mandate of the United States Supreme Court leads to the conclusion that the judgment which was entered by the

trial court pursuant to directions of the Supreme Court of this state was a final judgment upon the merits. The trial court was therefore without jurisdiction to make the orders in question. The case of *Taylor v. Darling*, 22 Cal.App. 101, 133 P. 503, is cited, but that case is clearly distinguishable. The court there said, "the record before us indicates that the judgment is not based on the merits." Here the record before us indicates that the judgment was based on the merits. It appears that this was the view taken by the Supreme Court of this state for after the order was made by the Supreme Court on June 10, 1937, Scarlett applied for an order modifying the order of June 10, 1937, by striking out the direction to the trial court to enter judgment in favor of the company and by inserting a provision expressly granting a new trial. This application was denied by the Supreme Court on July 8, 1937. Having determined that the trial court is exceeding its jurisdiction, the writ of prohibition should issue as the remedy by appeal is not a plain, speedy and adequate remedy. Code Civ.Proc. § 1103.

Let the peremptory writ of prohibition issue.

We concur: NOURSE, P. J.; STURTEVANT, J.



26 Cal.App.2d 552

FERNALD v. LAWSTEN et al.

Civ. 6003.

District Court of Appeal, Third District,
California.

May 25, 1938.

1. Trusts ☞61(1)

The trial court was authorized to decree termination of voluntary trust and direct reconveyance of trust property to trustor in equitable action by latter, in absence of express provision in trust agreement that trust should be irrevocable. Civ.Code, § 2280.

2. Trusts ☞61(1)

A statute providing specific procedure for revocation of voluntary trust will prevail over parties' contrary agreement, if

trust is not expressly made irrevocable. Civ. Code, § 2280.

3. Trusts ⇨56

Defendants in suit to terminate alleged voluntary trust admitted confidential relationship between trustor and trustee by failure to deny allegations, sufficient to raise such issue, in complaint. Civ.Code, §§ 2216, 2280.

4. Trusts ⇨48

A trustee's fraud in procuring trust property is implied, where he obtained title thereto with definite promises to carry out trustor's wishes respecting its management and reconvey it to trustor on request, but failed and refused to do so.

5. Trusts ⇨48

Equity will enforce reconveyance of trust property to trustor by trustee on ground of constructive fraud, where property was conveyed to trustee solely because of absolute confidence and trust reposed in him by trustor to administer trust for latter's benefit according to her desire and reconvey trust property to her at her request, and there was no consideration for conveyances except trustee's expectancy of inheriting what remained of property at trustor's death and receiving whatever compensation she saw fit to pay him. Civ.Code, §§ 2216, 2280.

6. Evidence ⇨434(3)

The rule precluding introduction of oral testimony varying terms of written instrument is inapplicable in suit to terminate voluntary trust and require reconveyance of trust property to trustor by trustee on ground of latter's constructive fraud in procuring execution of trust agreement and conveyances of property to him. Civ.Code, § 2280.

7. Evidence ⇨434(1)

Oral evidence of fraud in procuring execution of written instrument is always admissible. Civ.Code, § 1640.

8. Evidence ⇨434(3)

Oral evidence of circumstances and conditions under which trust agreement and conveyances of property to trustee were executed was competent in trustor's suit for termination of trust and reconveyance of property to show that transaction was intended by parties to be and constituted voluntary trust procured by constructive fraud. Civ.Code, §§ 2216, 2280; Code Civ.Proc. §§ 1856, 1860.

9. Evidence ⇨448

Evidence of extrinsic circumstances surrounding execution of trust agreement and conveyance of property to trustee was admissible for purpose of properly construing real nature of agreement in suit to terminate trust and require reconveyance of property to trustor. Code Civ.Proc. §§ 1856, 1860.

10. Trusts ⇨329

The appellate court must assume, in support of trial court's judgment allowing trustee compensation for his services in amount which he claimed did not include necessary expenses incurred in administering trust as required by statute, that he received all profits of trustor's business managed by him and free rental of trust property occupied by him, as trial court found that he was entitled, in absence of contrary evidence. Civ.Code, § 2273.

11. Trusts ⇨329

The appellate court must assume, on appeal from judgment allowing trustee compensation for his services in administering voluntary trust terminated by court, that evidence showed that trustee retained amount of all necessary expenses incurred by him from gross income of trust property, as provided by trust agreement, in absence of contrary evidence. Civ.Code, § 2273.

12. Trusts ⇨315(2)

The compensation to which trustee is entitled, when trust has not been fully administered and instrument creating it is silent as to such matter, is such reasonable sum as court may allow in sound discretion. Probate Code, § 1122.

13. Trusts ⇨316(2)

A trustee is entitled to allowance of commissions for his services in same amount to which executor is entitled only when trust has been fully administered and completed. Civ.Code, § 2274.

14. Trusts ⇨316(2)

A trustee was not entitled to commissions in amount to which executor is entitled for services rendered in administering trust terminated by judgment in equity suit by trustor, as trust was not fully administered. Civ.Code, § 2274.

15. Trusts ⇨315(2)

An allowance of \$1,500 to trustee as compensation for services in administering voluntary trust to manage trustor's business and property, worth about \$80,000, for

about two years before termination of trust by judgment in equity suit by trustor, *held* just and reasonable. Probate Code, § 1122.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Suit by Fanny Briggs Carr, after whose death R. Eliot Fernald, as special administrator of deceased's estate, was substituted as plaintiff, against Everett B. Lawsten, his wife, Jane Lawsten, and others, to terminate a trust, require reconveyances of realty and personalty involved therein to plaintiff, and quiet title. From a judgment terminating the trust and directing reconveyance of property, named defendants appeal.

Affirmed.

James F. McBryde and Louis Ballenger, both of Glendale, and H. B. Pool, of Los Angeles, for appellants.

A. McWilliam, C. H. Hasbrouck, and W. C. Anspach, all of Glendale, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

From a judgment terminating a voluntary trust and directing the reconveyance of real and personal property, the trustee and his wife have appealed.

The plaintiff, Fanny Briggs Carr, was an unmarried woman 72 years of age at the time of the execution of the trust agreement which is involved in this suit. She owned a cosmetic laboratory and business in Glendale, together with real and personal property valued at about \$80,000. In the spring of 1931 her household furniture was destroyed by fire. She wished to replace the furniture and with that object in view inquired of a friend regarding a reliable dealer from whom she could purchase the goods. He recommended that she deal with the appellant, Everett B. Lawsten, who operated a small second-hand furniture business valued at about \$1,500, located just across the street from her dwelling house. For the first time she met Mr. Lawsten for that purpose. At her invitation Mr. and Mrs. Lawsten visited in her home very frequently during the following year. A close bond of friendship and confidence developed between them. She consulted Mr. Lawsten about her business affairs. He was particularly agreeable to her, and

came to enjoy her complete confidence. The plaintiff declared that Mr. Lawsten was the only man she knew in whom she had absolute confidence. She was weary of her business obligations and asked him to manage the cosmetic business for her, which he did to her entire satisfaction during the year following their introduction.

Mrs. Carr believed in tithing and was anxious to use her excess income for charitable purposes. Mr. Lawsten encouraged this inclination and aided her in fulfilling those plans. She procured him to attend to many of her personal affairs, such as banking and legal transactions. She had executed a will which was in the possession of her attorney. She sent Lawsten for that will, and after telling him she was prejudiced against wills on account of frequent legal conflicts over such instruments, she destroyed her will in his presence, burning it in the fireplace. She told him she intended to create a trust of her property so as to carry on her business and her charitable objects. She told him that she would like to make him her trustee for that purpose. He assured her that he would faithfully carry out the objects of her trust and if, at any time, she wished him to convey any of her property to others or reconvey it to her, he would promptly do so at her request. She asked him to inquire regarding a good and reliable lawyer. He did so and recommended a firm consisting of two attorneys, who visited her several times to secure the data for drawing the necessary instruments. She told them she intended to create a voluntary trust in Mr. Lawsten as above stated. Those lawyers advised her against that procedure, saying that it placed too much power and authority in the hands of a stranger. She, however, insisted on creating the trust and the instruments were prepared and duly executed. The trust agreement and conveyances of property were executed at the same time as a part of the same transaction. They conveyed to Everett B. Lawsten all of the real and personal property which the plaintiff possessed, including the following: Lot 14, tract 4490, City of Glendale; lot 53, tract 4554, Glendale; the east half of lot 19, block 4, tract 1788, San Bernardino county; one share of water stock, evidenced by certificate number 1395; a lease to real property at number 1601 E. Colorado boulevard in Glendale, dated June 1, 1927, from plaintiff to H. Ito;

eight promissory notes payable to plaintiff, aggregating the sum of \$18,406.58; a lease to a portion of lot 14, tract 4490, City of Glendale, dated June 1, 1932, to S. Tomiyana; a \$1,000 certificate, number 341 of the "Vanderbilt News"; one certificate number 3677 of Trust No. 33, for one share in "Ferguson Trust"; ninety shares of common stock of the Southern California Edison Company; a debt of \$600 owing by E. B. Lawsten; all books, documents, records and equipment of the cosmetic business.

The trust agreement which was executed as a part of the same transaction was made September 27, 1932, between Fanny Briggs Carr, as party of the first part, and Everett B. Lawsten, as party of the second part. It contains the following language:

"Whereas the First Party has, by deed executed concurrently with this said instrument, deeded to the Party of the Second Part all of her right, title and interest in and to the following described property, * * *

"Whereas the First Party has transferred to the Second Party, all of her right, title and interest in and to her business known as Fanny Briggs Carr, Face Preparations, and

"Whereas the First Party has reached the age in life where she desires to escape the difficulties and responsibilities of running such a business and taking care of property, and

"Whereas the Second Party has been and now is managing the said business of said First Party and is also taking care of the real property of First Party together with the collection of rentals etc.,

"Now, Therefore, for and in consideration of the premises, the First Party, by deed executed concurrently herewith, conveys unto the Second Party, as *Trustee*, all and singular the property hereinbefore described, real and personal, * * * upon the following trusts and for the following uses and purposes:

"First. That the First Party shall have the right to occupy the residence on said real property during her lifetime.

"Second. The Second Party agrees to manage and run the properties and/or business of the First Party during her lifetime and to collect the rents and revenues from the same; the Second Party agrees to pay the net income from the

rents, issues and profits of said property and business to the First Party during her natural lifetime, after first deducting the charges for repairs, taxes, assessments, insurance, etc.;

"Third. It being understood and agreed and a consideration of the transfer of this property that the First Party shall receive the income from the real property, leases, notes, stocks, bonds, mortgages, trust deeds and business, * * *.

"Fourth. In case the income of said trust fund shall not be sufficient for the care, maintenance and support of said First Party, *trustee* may and shall use so much of the principal as may be necessary for said purpose.

"At the death of the said First Party the said trust shall terminate, and the property remaining in the said *trustee's* hands, real and personal, is hereby granted to Everett B. Lawsten, heirs and assigns forever.

"It is understood and agreed that the Second Party is to hold the said real property in his name and in his possession during the lifetime of the First Party, unless otherwise agreed upon in writing by the parties hereto, and to manage, run and take care of the said real property and business for the sole benefit of the First Party, * * *

"In the event that the Second Party, as *trustee*, should cease to be the *trustee* by reason of his death or otherwise, then in that event R. Elliott Fernald is to act as trustee until the termination of this trust as aforesaid.

"The Second Party, Everett B. Lawsten, hereby accepts the duties and obligations as *trustee* in accordance with the terms of this instrument."

Difficulties arose between the trustor and the trustee regarding the execution of this trust agreement, and on October 22, 1934, the trustor revoked in writing the trust as provided by Section 2280 of the Civil Code. This suit to terminate the trust, to require the execution of reconveyances to the plaintiff of the real and personal property involved therein, and to quiet title, was then commenced against both Mr. and Mrs. Lawsten. The complaint was couched in two counts. Mrs. Lawsten was made a party defendant to foreclose any claim of community interest which she might make to the property by virtue of the conveyances which were

made to her husband. The defendants denied the essential allegations of the complaint. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every respect.

It was determined that the several conveyances of real and personal property and the written agreement were executed as a part of the same transaction and that they constituted a voluntary trust, subject to revocation by the trustor under the provisions of Section 2280 of the Civil Code, which revocation was duly accomplished, and the trustee was thereupon directed to reconvey to plaintiff all of the real and personal property remaining in his custody. Compensation for the trustee's services were fixed by the court at the sum of \$1,500, in addition to such pay as he had already received and retained. A decree to that effect was accordingly rendered. From that decree the defendants have appealed.

The appellants contend the evidence fails to support the finding that a confidential relationship existed between the plaintiff and Mr. Lawsten; that the transaction does not constitute a voluntary trust, but on the contrary that it was an absolute conveyance to Lawsten of the real and personal property subject to a life estate therein in favor of the vendor; that the written agreement is irrevocable and rescission of the contract does not lie; that the court erred in admitting oral evidence varying the terms of the written instruments, and that the court erred in allowing compensation to the trustee for only the sum of \$1,500.

The record contains ample evidence to support the finding that the transaction in question constitutes a voluntary trust, which is defined in section 2216 of the Civil Code as follows:

"A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another."

The court found:

"That it is true that on the 27th day of September, 1932, plaintiff as trustor did create a voluntary trust, therein making the defendant Everett B. Lawsten trustee, wherein and whereby the said plaintiff transferred and delivered to the defendant Everett B. Lawsten, in trust, all of the said real and personal property hereinbefore described.

"That it is true that for a long time prior to the creation of said voluntary trust as

aforesaid, the most confidential relationship existed between the plaintiff and the defendant Everett B. Lawsten, * * *."

The court also found that the conveyances of real and personal property were made to the defendant Lawsten without consideration except for his conditional expectancy of acquiring title thereto upon the death of the plaintiff. The transfer of property connected with the trust agreement, is testamentary in its nature. With respect to such transactions it is said in 26 Ruling Case Law, page 1208, § 49:

"A trust for the beneficial interest of the author during life is revocable as to that interest, and may be revoked by a conveyance from the trustee to him; and it seems that if no one has any interest in the fund but the settlor himself he may require a conveyance of the trust property to himself."

In 100 Am.St.Rep. page 105, note, it is said:

"If a trust is both voluntary and testamentary in character and no immediate interest vests thereunder in any beneficiary, it so far resembles a will that it may be revoked by the grantor at any time prior to his decease."

[1] Regardless of the general rule with respect to the right to revoke trusts which are completed, the amendment of section 2280 of the Civil Code specifically authorizes the revocation of voluntary trusts, as follows:

"Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby."

In the present case the voluntary trust was created September 27, 1932, after the adoption of the preceding amendment to the code, and the trustor fully complied with the requirements of that section by notifying the trustee in writing of the revocation of the trust on October 22, 1934. The trust agreement contains no express provision that it is to become irrevocable. It is expressly provided that the trust shall become revocable when "agreed upon in writing by the parties thereto". This does not affirmatively declare the trust may not be other-

wise terminated. Since the document is not expressly made irrevocable, it may be revoked in the manner provided by section 2280 of the Civil Code. The instrument specifically declares in detail the manner in which the trust is to be administered by the trustee. It includes in that respect language to the effect that the trustee is "to manage, run and take care of the said real property and business for the sole benefit of the First Party, and the Second Party agrees to exert his best efforts in an honest endeavor to manage and run the said properties and business of the said First Party". The clear inference from the language of the trust agreement is that, for any wilful and flagrant violation of that agreement on the part of the trustee, it may be revoked as provided by section 2280 of the Civil Code. The trial court was therefore authorized in this equitable action to decree a termination of the voluntary trust and to direct the reconveyance of the property to the trustor.

[2] The cases cited by the appellants to the effect that when the trust agreement declares the method by which it may be revoked it is exclusive in that regard and must be substantially followed have application to the present case, since they were decided by the California courts before the amendment of section 2280 of the Civil Code was enacted, which now authorizes the revocation of a voluntary trust in the manner therein provided, unless it is expressly made irrevocable. Where the statute provides the specific procedure of revoking a voluntary trust, it will prevail over an agreement between the parties to the contrary, provided the trust is not expressly made irrevocable.

[3] There is no merit in the appellants' contention that the complaint falls to allege facts sufficient to show that a confidential relationship existed between the plaintiff and the trustee, Everett B. Lawsten. The complaint contains allegations sufficient to raise that issue. No demurrer was filed by the defendants. The confidential relationship of the trustor and the trustee was admitted by failure on the part of the defendants to deny those allegations in the complaint.

[4] The evidence adequately supports the findings of the court to the effect that the property was conveyed to the trustee, Everett B. Lawsten, without consideration and with an express agreement that he would, at any time, reconvey it to the plain-

tiff. The court found that the defendant, Everett B. Lawsten, agreed to faithfully execute the trust for the sole benefit of the trustor and that he would consult and advise with her regarding the management of the property and the disposition of the proceeds therefrom, and carry out her wishes with relation thereto and that he "would upon request of the plaintiff trustor transfer and convey his full title to the trust estate to her or to whomsoever she might designate without expense or obligation to the trust estate".

It was not necessary for the court to specifically find that the trustee procured the conveyance of the real and personal property with the intent to defraud the plaintiff. It was alleged and adequately proved that the trustee obtained title to the property with the definite promise to carry out the wishes of the trustor with respect to its management and to reconvey it to her upon request therefor, and that he failed and refused to do so. Under such circumstances fraud in procuring the property is implied.

In the case of *Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521, a judgment was affirmed which required a grantee to reconvey land to the owner thereof, toward whom he occupied a relationship of confidence and trust. In that case it was held that where the confidential relationship was established, constructive fraud would be presumed without the necessity of either alleging or proving an actual intent on the part of the grantee to defraud the owner of the land. Quoting with approval from the case of *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162, it is said in the *Alaniz*' Case (page 522):

"If, by means of a parol promise to reconvey, a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform."

[5] There is an abundance of evidence in the present case to show that the property was conveyed to Mr. Lawsten solely because of the absolute confidence and trust which the plaintiff had in him to administer the trust for her benefit according to her desire, and to reconvey it, or any part thereof, to her or to any other person she named as grantee, at her request. Her attorneys warned her not to execute the trust agreement, but she insisted on doing so,

positively declaring that she had more confidence in Lawsten than in any other man in the world. There was no consideration for the transfers of property except the trustee's expectancy to inherit what remained of the property at the death of the trustor, and whatever compensation she saw fit to pay him for his administration of the trust.

Under such circumstances equity will enforce a reconveyance of the property on the ground of constructive fraud. Moreover, section 2280 of the Civil Code specifically provides for a revocation of such a voluntary trust.

[6,7] It is insisted the court erred in receiving oral evidence regarding the circumstances and conditions under which the trust agreement and conveyance of property were executed, for the reason that it tended to vary the terms of the written instruments. We are, however, of the opinion the present case falls within the exception to the well-known rule of law which precludes the introduction of oral testimony which varies the terms of a written instrument. The complaint in this case alleges facts which amount to constructive fraud in procuring the execution of a voluntary trust, together with the conveyances of property in question. Where fraud is involved in procuring the execution of a written instrument, oral evidence thereof is always admissible. In this case the trust was procured by the trustee *ex maleficio* and justice will not permit him to retain the fruits of his stratagem by adhering to a general rule of evidence. Section 1640 of the Civil Code provides that:

"When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

In 3 Jones Commentaries on Evidence, 2nd edition, page 2628, section 1450, it is said:

"It is elementary that the statute of frauds does not prevent the proof and enforcement of those implied trusts which arise when one sustaining a fiduciary relation obtains the legal title to property by fraud or in any other such manner that he cannot equitably hold property which justly belongs to another."

[8] In this case the oral evidence was competent to show that the transaction was intended by the parties to be and that it

constitutes a voluntary trust which was procured by constructive fraud. In *Bradley Company v. Bradley*, 165 Cal. 237, 131 P. 750, it was held that a parol trust in real property, created at the time when a voluntary grant of the property was made, without consideration, between persons occupying relations of great confidence to each other, and in reliance upon those relations to the effect that the grantee would take and hold the property for the benefit of the grantor and reconvey it to him on demand, is enforceable in equity upon its repudiation by the grantee. The court said (page 751):

"In its creation the trust was voluntary, and, however at variance it may be thought to be with the mandate of the statute as to the creation of trusts in land, it is of such character that equity will not permit the trustee to take advantage of the confidential relations existing in which the trust itself originated and by repudiating the trust obtain an unconscionable advantage over the confiding trustor and beneficiary. So numerous are cases upon this subject that it must suffice to refer to *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Cooney v. Glynn*, 157 Cal. 583, 108 P. 506; *Jones v. Jones*, 140 Cal. 587, 74 P. 143; *Kimball v. Tripp*, 136 Cal. 631, 69 P. 428."

[9] The extrinsic circumstances surrounding this transaction are admissible for the purpose of properly construing the real nature of the trust agreement, which is the chief issue in this case. (Secs. 1860 and 1856, Code Civ.Proc.) Section 1860 provides:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

The last paragraph of section 1856 modifies the preceding portion thereof regarding the general rule prohibiting the varying of the terms of a written instrument, as follows:

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

We therefore conclude that the oral evidence was properly admitted to construe the

nature of the instruments and for the purpose of showing constructive fraud.

[10,11] Finally, it is asserted the court failed to make the proper allowance to the trustee as compensation for his services. It is claimed the allowance of \$1,500 which was awarded to the trustee does not purport to include necessary expenses which he incurred in administering the trust as required by section 2273 of the Civil Code. We are directed to no evidence of such expenses which have not been fully compensated. The court found that he was entitled to \$1,500 "together with such sums as he has already received as profits from the cosmetic business belonging to the plaintiff and as free rental of trust property occupied by defendants". In the absence of evidence to the contrary we must assume, in support of the judgment that the defendants received all of the profits of the business, and free rental of the property in question. Moreover, the trust agreement provides, and we must assume the evidence shows that all necessary expenses incurred by the trustee in administering the trust have been retained by him from the gross income of the property. There is no evidence to the contrary. The agreement provides that only the *net income* from the property is to be paid to the plaintiff. We assume that is exactly what occurred. The agreement reads in that regard:

"The Second Party agrees to pay the *net income* from the rents, issues and profits of said property and business to the First Party during her natural lifetime, after first deducting the charges for repairs, taxes, assessments, insurance, etc.

"* * * The said Second Party, as trustee, holding said property for the First Party, shall collect all of the income, interest and other proceeds, if any from said property and business from time to time when due, and deliver the same to First Party for her support and maintenance after, however, first deducting the charges and expenses as set out in number Second hereof."

[12,13] The compensation to which a trustee is entitled, when the trust has not been fully administered, and the instrument creating the trust is silent in that respect, is such reasonable sum as, in sound discretion, the court may allow. Sec. 1122, Prob. Code; 25 Cal.Jur. 336, sec. 186; Treadwell v. Nickel, 194 Cal. 243, 265, 228 P. 25. The allowance of commissions for the services of a trustee, in the same amount

to which an executor is entitled, under section 2274 of the Civil Code, applies only when the trust has been fully administered and completed. In 25 California Jurisprudence, at page 336, it is said in that regard: "This right to the statutory commission exists, however, only where the trust has been fully administered."

[14,15] In the present case the trust was not fully administered, and section 2274 of the Civil Code, therefore, has no application to the circumstances which are here involved. We are of the opinion the allowance which the court awarded to the trustee is just and reasonable.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



26 Cal.App.2d 501

URY v. FREDKIN'S MARKETS, Inc.,
et al.*

Civ. 10329.

District Court of Appeal, First District,
Division 1, California.

May 24, 1938.

1. Negligence ⇐138(4)

In personal injury action, assumption of risk instruction was not error, notwithstanding that defendants' answers contained no specific plea of assumption of risk, where defense of plaintiff's contributory negligence was pleaded and the evidence upon which the assumption of risk instruction was based was admissible in support of such defense.

2. Negligence ⇐4

What is ordinary care depends upon time, place and person.

3. Negligence ⇐66(1)

A 74 year old woman of frail and slight physique suing for injuries resulting from fall sustained when salesman in provision, fruit and vegetable market slightly brushed woman's elbow or arm must be charged with knowledge of her physical condition and to the risk she incurred in stationing herself so near to salesman that an ordinary move-

*Hearing denied by Supreme Court July 21, 1938.

ment on his part might jeopardize her safety.

4. Negligence $\Rightarrow$ 136(26)

Evidence whether 74 year old woman of slight physique suing for injuries resulting from fall sustained when salesman in provision, fruit and vegetable market slightly brushed woman's elbow or arm was contributorily negligent in placing herself behind salesman and so near to him that a slight movement on his part brought him in contact with her while her attention was directed the other way was for jury.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Frances M. Ury against Fredkin's Markets, Inc., and others to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellant.

Frank V. Campbell, L. H. Schellbach, and Walter E. Rankin, all of San Jose (Robert E. Hayes, of San Jose, of counsel), for respondents.

CASHIN, Justice.

The plaintiff sought to recover damages for personal injuries alleged to have been caused by the negligence of the defendants. The latter answered, denying negligence on their part, and alleged that the plaintiff had herself been negligent in the matter and that her negligence contributed proximately to the injuries sustained. The cause was tried before a jury, which rendered a verdict for the defendants. The plaintiff appeals.

Two contentions are made in support of the appeal, viz., that the court erred in one of its instructions to the jury, and that there was no evidence of negligence on the part of the plaintiff upon which an instruction on the subject of contributory negligence could be based.

[1] The instruction was in the following terms: "The court instructs you that one who voluntarily places herself in a position of danger, knowing the situation as it exists, and knowing at the time how she might avoid the danger to herself if she

used ordinary care for her own protection, is assumed in law to have assumed the risk of the situation which she voluntarily goes into."

It is contended that this instruction is erroneous because the answer of the defendants contained no specific plea of assumption of risk.

The point is not well taken for the reason that the defense of plaintiff's contributory negligence was pleaded, under which the evidence upon which the instruction is based was admissible. *Commonwealth Bonding & Casualty Ins. Co. v. Pacific Elec. R. Co.*, 42 Cal.App. 573, 184 P. 29; *Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144; *Anderson v. Western Pacific R. R. Co.*, 17 Cal.App.2d 244, 61 P.2d 1209; 39 Cor.Jur., Master and Servant, § 883, p. 684; *Restatement of the Law of Torts*, § 466.

Defendants' second point necessitates a reference to the testimony.

The injuries suffered by plaintiff were the result of the bodies of plaintiff and defendant Don Cissi coming in contact with sufficient violence to cause plaintiff to fall to the ground. It happened in a provision, fruit and vegetable market conducted by defendant Fredkin's Markets, Inc., the employer of Cissi, serving in the capacity of salesman, whose movement in making a sale brought him in bodily contact with plaintiff. The market was conducted under the quite common system of dividing the floor space of a building or part thereof into blocks, occupied by displays of merchandise, with passageways or aisles between them, there being no counters behind which the salesmen stand, these taking their place immediately in front of the particular merchandise they each are engaged in selling, and in a sense mingling with the public, which has practically equal access to the merchandise with the salesmen. The plaintiff entered this market one Saturday afternoon for the purpose of buying cherries. She is a woman of frail and slight physique and at the time of the occurrence was 74 years of age. Don Cissi was stationed at a vegetable and fruit stand on the west side of an aisle running north and south. He was engaged in waiting on a customer, and was stooping over with his back to the aisle putting tomatoes in a bag preparatory to weighing them at a scale situated to his right, to reach which it was necessary for him to walk a step or two parallel with his stand. In straighten-

ing up and turning to his right his body came in contact with that of the plaintiff, who was standing close to him, behind and a little to his right. Though so close to and behind Cissi she was not looking in his direction but was gazing to the north along the aisle. As already stated, as a result of this contact she fell to the ground and was quite severely injured, one of her hip joints being fractured.

A few lines from the testimony will emphasize the facts which bear upon the question whether the record discloses sufficient evidence upon which the court was justified in giving to the jury any instruction bearing on the subject of contributory negligence.

Mrs. George Dolfin, a witness for the plaintiff, testified: "He (referring to Cissi) did not strike her; he kind of, seemed to me, he kind of touched her shoulder * * * and I am sure she was very frail and fell over that way. * * * I don't think it would have upset me."

Don Cissi, although one of the defendants, was called as a witness by the plaintiff. He testified: "As I turned from the stand I slightly brushed her elbow or arm. I don't think the contact was severe enough to cause anyone to fall over. I was standing still but I moved around fast. * * * I had not started to walk yet. * * * I had just turned and was going to the scale. I looked towards the scale but I did not see Miss Ury."

The plaintiff was a witness in her own behalf. From her testimony we take one or two questions and answers:

"Q. Now when he struck you was he moving forward or was he just turning around? A. Just turning around.

"Q. As he testified? A. Yes.

"Q. Was he moving forward? A. I don't think he was. He just turned around quickly and he didn't see me."

Cissi also testified that physical contacts of the character here involved were of daily occurrence in the market, happily not followed, however, by serious consequences.

[2-4] This review, we think, makes it clear that there was sufficient testimony upon which the question whether the plaintiff, in placing herself behind Cissi and so near to him that a slight movement on his part brought him in contact with her, and she the while directing her attention away from him, exercised ordinary care for her own safety, could properly be submitted to

the jury. The instruction left it to them to say whether under these circumstances the plaintiff assumed the risk of injury which might result from the sort of physical contact shown in this case. What is ordinary care depends upon time, place and person. An ordinarily robust person may in perfect safety get into situations which would be dangerous to a child or to a person of great age or feebleness. The plaintiff must be charged with knowledge of her physical condition, and of the risk she incurred in stationing herself so near to Cissi, engrossed in his work, that an ordinary movement on his part necessitated thereby might jeopardize her safety.

We conclude that the question of plaintiff's negligence was on the evidence properly submitted to the jury.

For the foregoing reasons the judgment is affirmed.

I concur: TYLER, P. J.

KNIGHT, Justice (concurring).

It is my conclusion that the evidence did not justify the giving of respondents' instruction upon the doctrine of assumption of risk (No. 12) or the two others given in connection therewith upon the law of contributory negligence (Nos. 14 and 18) embodying respondents' theory that appellant's age and physical condition served as contributing causes to the happening of the accident. Such conclusion is based upon the following uncontroverted facts: that the clerk Don Cissi, collided with appellant, and that the impact regardless of the force thereof was the proximate cause of appellant's fall; that appellant was at the time a business invitee upon the premises, and when struck was standing still, in the main aisle, which was ten feet wide, waiting to be served as a customer; that she was standing approximately three feet from said clerk, and although other parts of the market were quite well filled with shoppers, there was but one other person besides appellant and the clerk in the aisle in which she was standing when the clerk collided with her. The instructions above referred to were, therefore, in my opinion, erroneous. However, it is held in *Brandes v. Rucker-Fuller Desk Co.*, 102 Cal.App. 221, 282 P. 1009, and other cases cited therein, that even though the evidence in a case be insufficient to sustain the defense to which instructions are directed, a reversal is not warranted on that ground when the

evidence as to other defenses which are pleaded is sufficient to sustain the verdict; and in the present case respondents pleaded and they mainly relied upon the additional defense that the accident was unavoidable and did not result from a want of exercise of ordinary care on the part of the clerk; and apparently the circumstances attending the accident are such as to sustain the implied finding of the jury on that issue. It would seem to follow, therefore, that the giving of the irrelevant instructions did not constitute prejudicial error; and upon that ground I concur in the judgment of affirmance.



26 Cal.App.2d 538

SMALLPAGE v. TURLOCK IRR. DIST.
et al.*
Civ. 5990.

District Court of Appeal, Third District,
California.

May 24, 1938.

1. Appeal and error ⇨119, 873(1)

An order on motion to retax costs, made after rendition and entry of final judgment, is appealable as a special order and is not reversible on appeal from the judgment. Code Civ.Proc. § 963.

2. Nuisance ⇨66

One may not acquire by prescription an easement to maintain a public nuisance or a right to pollute a stream to detriment of the public.

3. Nuisance ⇨66

In action against city and irrigation district to quiet title to lands used for sewage disposal and drainage, wherein city claimed title by prescription, evidence that city's use of such lands constituted a public nuisance was admissible and authorized granting of relief prayed under rule that easement to maintain public nuisance cannot be acquired by prescription.

4. Waters and water courses ⇨228½

Where deed of land to irrigation district for canal and waterway provided that land should revert if not needed or used or if canal should be abandoned, deed conveyed only an easement for irrigation uses, and

hence use of canal for drainage and sewage disposal by city to which irrigation district conveyed right to use canal, and abandonment of use for irrigation, resulted in reversion to successors in interest of grantors. Civ.Code, § 801; Political Code, § 2631.

5. Waters and water courses ⇨228½

Where deed of land to irrigation district for canal and waterway provided for reversion if land should not be needed or used or if canal should be abandoned, district could not convey to city any greater use or title than district possessed.

6. Waters and water courses ⇨228½

Where irrigation district acquired easement for use of land for irrigation canal only but allegedly used canal for other purposes, adversely to interests of owners, and conveyed right to use canal to city before prescriptive period had run, conveyance to city could not create a greater burden than the servient tenement was then under, and district's alleged prescriptive right did not inure to city's benefit.

7. Quietting title ⇨29

An owner of land, seeking to quiet title thereto against claim of easement for use of land for irrigation, on ground that abandonment of use for irrigation and use for sewage disposal and drainage had resulted in reversion, who showed that such use of land constituted a public nuisance, was not barred by laches, especially where defense of laches was not raised in the pleadings nor during the trial.

8. Evidence ⇨96(1)

The burden of proving laches rests upon the one relying upon such defense.

9. Easements ⇨10(1)

Where irrigation district had easement by prescription to use lot for irrigation canal and city to which district conveyed right to use canal had easement by prescription for sewage disposal purposes over another part of such lot wherein sewage was conveyed in inclosed pipes, no easement by prescription to convey sewage in an open ditch would vest.

10. Appeal and error ⇨172(3)

On appeal from decree quietting title to land against city's claim of easement to use land for sewage disposal and drainage purposes, wherein city did not present in trial court the question of city's right of eminent domain, and city's use of land was found to

*Hearing denied by Supreme Court July 21, 1938.

constitute a public nuisance, failure to permit city to exercise eminent domain was not reversible error.

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Action by Carrie M. Smallpage against the Turlock Irrigation District and the City of Turlock, to quiet title to certain lands. From a decree quieting title in favor of plaintiff, defendants appeal.

Affirmed.

Griffin & Boone and E. T. Taylor, all of Modesto, and W. Coburn Cook, of Turlock, for appellants.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiff as the owner of certain lands against the Turlock Irrigation District and The City of Turlock to quiet title to certain lands.

Between lots 13 and 14 and lots 11, 12 and 17 of Robosson Colony No. I, in the county of Stanislaus, is a strip of land 80 feet in width, over and across which are certain drainage canals; one used by the Turlock Irrigation District as a drainage canal and the other used by the City of Turlock as a drainage canal and as a sewerage outlet. This part of the sewerage system of The City of Turlock extends from the city farm for approximately two miles through a 24-inch pipe line, then empties into an open drain, which extends perhaps a mile further in a westerly direction, and in turn empties into the open drain running southerly between these parcels of plaintiff's property, and eventually into the San Joaquin river.

In 1913 and 1914 the land owners, including plaintiff's predecessors in interest, granted by deed to the Turlock Irrigation District a strip of land 80 feet in width, which deed also contained a condition providing if the district should cease to maintain a canal on this right of way the property would revert to the grantors. The only exception to this is in regard to lot 11, which shows no grant to the Turlock Irrigation District, but it appears that no taxes have been paid by plaintiff upon the land during the period of time here in question. From the granting of

this strip a canal has been maintained by the district; first a dirt canal from 1914 to 1918, and then a cement canal was constructed on the west one-half paralleling the dirt drainage canal on the east one-half of the right of way. In 1923 Turlock Irrigation District purported to grant to The City of Turlock the right to use certain of its drainage canals, and particularly the dirt drainage canal above referred to, known as the Chatom drain. The cement canal conveys irrigation water and also acts as a drainage ditch for surplus waters. The dirt drainage ditch is used for some natural drainage by The City of Turlock but principally to convey sewage from the city sewer farm.

The City of Turlock, in addition to denying plaintiff's title to the 80-foot strip, alleged an easement from the Turlock Irrigation District; claimed title by diverse user; prayed for declaratory relief, and set up facts to show a public use and necessity of said drain as a basis for the application of inverse condemnation. The answer of the Turlock Irrigation District denied plaintiff's title, pleaded the statutes of limitations and alleged title in fee and right of possession to be in itself.

Afer trial a decree quieting title in favor of plaintiff was entered. The findings and judgment held that the right of the Turlock Irrigation District in the 80-foot strip amounted only to an easement for the purpose of conveying drainage and irrigation waters, but The City of Turlock had no right whatever in the easement. Both the district and the city have appealed from the judgment, contending that there is no evidence to support the judgment, and contending further that the case is a proper one for inverse condemnation, and that the trial court erred in the allowance of certain costs to plaintiff.

At the trial plaintiff offered in evidence the deeds by which her title was deraigned, and rested. It was stipulated that neither plaintiff nor her predecessors have been assessed for any taxes on the 80-foot strip. The defendants introduced the deeds granting portions of the property to the Turlock Irrigation District, the agreement between the district and The City of Turlock for the use of the canals, the resolution of the city council of Turlock showing public necessity of the use of the drainage canal, and testimony showing the physical facts, the length of use and the necessity of use of the ditches

for irrigation, drainage and sewage disposal. Plaintiff then offered testimony that mosquitoes bred in the drainage canal and that there was a disagreeable odor from the Chatom drain.

Upon appeal appellants urged, first, that the trial court erred in the allowance of certain costs to plaintiff; second, there was error in the admission of evidence of a public nuisance; third, the evidence showed that The City of Turlock had a valid easement by grant from the Turlock Irrigation District, and that the district had title by grant, and that the plaintiff had no interest in the property in issue; fourth, that if appellants did not have title by grant, they had title by prescription; fifth, that the trial court should have permitted the exercise of the power of eminent domain by The City of Turlock.

[1] Considering these points in the order named, we find that The City of Turlock moved to tax certain costs, representing certified copies of deeds used at the trial, being plaintiff's exhibits 1 to 17 inclusive. It has frequently been held that an order on motion to retax costs made after the rendition and entry of final judgment, is appealable as a special order, and is not reversible on an appeal from the judgment. *Empire Co. v. Bonanza Co.*, 67 Cal. 406, 7 P. 810; *Hand v. Carlson*, 138 Cal.App. 202, 31 P.2d 1084; sec. 963, Code Civ.Proc.

As to the contention that the court erred in the admission of evidence of a public nuisance, we find The City of Turlock attempted to set up a title by prescription to the land in dispute, and that it had since 1922 made use of the open earthen ditch, the so-called Chatom drain, as a means of disposal of all of the sewage of The City of Turlock, and by this use claimed the city had acquired an easement by prescription over and across respondent's land.

[2,3] In answer to this contention appellant offered evidence in rebuttal as to the breeding of mosquitoes and the offensive odors arising from the canal. The rule is well established that one may not acquire an easement by prescription to maintain a public nuisance, and there can be no prescriptive right to pollute a stream to the detriment of the public. *Bowen v. Wendt*, 103 Cal. 236, 37 P. 149; *Strong v. Sullivan*, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343; *Vowinkel v. N. Clark & Sons*, 216 Cal. 156, 13 P.2d 733; *City of Turlock v. Bristow*, 103 Cal.App. 750, 284 P. 962; *Adams v. City of Modesto*, 131 Cal. 501, 63 P. 1083.

It would therefore appear that there was no error in the admission of the evidence as to public nuisance.

The court after hearing the evidence and visiting the lands of plaintiff found that "during all of said time said use constituted a public nuisance with substantial injury to plaintiff herein".

It is next claimed by appellants that the evidence shows that The City of Turlock had a valid easement by grant from the Irrigation District which itself had title by grant, and that plaintiff had no interest in the property. Before The City of Turlock, however, could establish any right in the property it had first to establish that its grantor, Turlock Irrigation District, had such an easement over the land of respondent, and that it could convey the same to The City of Turlock. Appellants attempted to do this by introducing certain deeds from respondent's predecessor to the Irrigation District, claiming that the deeds were grants in fee and not easements. An examination of these deeds reveals that they contain certain recitals hereinafter set out, from which it would appear that the conveyance was limited to the purposes of irrigation and for no other purpose. In *Parks v. Gates*, 186 Cal. 151, 199 P. 40, the contention was made that a certain deed vested in Gates title in fee to a strip of land. Parks claimed the deed conveyed only an easement for a right of way for road purposes, and that in any event he had acquired the right to maintain an irrigating ditch across the road by adverse user and also as an incident of the conveyance between himself and the former owner. The court found that title to the strip of land was in Parks subject to an easement in favor of Gates for road purposes only. This construction was upheld on appeal. The court further said that in determining the effect of a deed the whole instrument must be read together and the habendum clause may be resorted to as a limitation upon the estate granted.

In the deed before us we find, following the description, the words: "Conveying said land of the said party of the second part for the use and purposes of such a canal and waterway." We also find the following: "If the same be not needed or used or if such canal be abandoned, said land shall revert to the party of the first part, his heirs, executors, administrators or assigns."

[4] In support of the contention the grant created an easement in the grantee only, the cases of *Moakley v. Los Angeles*

Pacific Ry. Co., 139 Cal.App. 421, 34 P.2d 218, and *Marlin v. Robinson*, 123 Cal.App. 373, 11 P.2d 70, are in point.

"There is no dispute under the authorities that a direct grant of a 'right of way' carries with it only an easement in the land. Rights of way are classified as easements by section 801 of the Civil Code, and section 2631 of the Political Code. Nothing passes by a grant of a right of way 'but that which is necessary for its reasonable and proper enjoyment.'" *Parks v. Gates*, supra (199 P. page 41), citing authorities.

In view of the language contained in the deeds before us, it does not seem reasonable that it was the intention that the Irrigation District could convey the land to others or that the land could be used for purposes other than that set forth in the habendum clause of the deed, and the trial court so found.

Respondent also claims title to the so-called Chatom drain by virtue of the reversion to respondent because of the abandonment of this strip of land by the Irrigation District.

In the deed of 1913 from respondent's predecessor to the Irrigation District, we find (supra) that the land was conveyed for a canal and waterway, and if the project was abandoned or not needed for such purposes the land would revert to the grantor.

The Irrigation District is still using the concrete lined canal paralleling the Chatom drain, but the court found from the evidence that the district had abandoned the easterly portion of the land described in the deeds, the so-called Chatom drain.

[5,6] Appellants then contend that if they have no title by grant then they have title by prescription to the land in dispute. Respondent does not dispute the right of the Irrigation District to the portion of the granted lands used by it for drainage purposes, but she does contend that the Irrigation District in 1930 abandoned the Chatom drain and now uses exclusively the concrete lined canal to dispose of its drainage waters. Inasmuch as the right of the district was limited to a special purpose it could not convey to the city any greater use or title than it itself possessed. And in view of the

fact the canal was not finished until 1919, and the purported deed from the Irrigation District to the city was executed in 1922, at that time even if the district's use of the ditch was adverse to respondent, the Irrigation District had acquired no prescriptive title, and having no title could convey none; but even if it had such title, it could not by a conveyance create a greater burden than the servient tenement was then under. It would therefore seem that even if the district had some right in the land, such right would not enure to the benefit of the city. *Cummings v. Cummings*, 55 Cal.App. 433, 203 P. 452.

[7,8] Neither is respondent barred by laches, for in *City of Turlock v. Bristow*, supra, the court held (284 P. page 965): "Neither prescriptive rights, laches, nor the statute of limitations is a defense against the maintenance of a public nuisance." Furthermore, the burden of proving laches rests upon the one relying upon such defense, and this defense was not raised in the pleadings nor during the trial. *Mills v. Richmond Co.*, 63 Cal.App. 594, 219 P. 465.

[9] In regard to lot 11, neither the Irrigation District nor the city had any easement or other title by grant. It was admitted by respondent at the trial that the district had an easement by prescription over lot 11, and that The City of Turlock had an easement by prescription over that part of lot 11 wherein the sewage is conveyed in an enclosed pipe line, but as to that portion where the sewage is conveyed in an open ditch, and found by the court to constitute a nuisance, no easement by prescription would vest.

[10] In answer to the last point that the court should have permitted the city to exercise its power of eminent domain, it does not appear that the city presented this matter either in the pleadings or at the trial, and we need merely suggest that even if title were acquired by such proceedings the city would not so run its sewage across the lands of respondent so as to constitute a public nuisance.

For the foregoing reasons the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

26 Cal.App.2d 545

LEGGATE v. PORTER.

Civ. 1885.

District Court of Appeal, Fourth District,
California.

May 24, 1938.

1. Banks and banking ⇨76

In action in California against owner of Iowa private bank which was under receivership in Iowa, on certificates of deposit made and payable in Iowa, defended on ground that plaintiff's sole remedy was in receivership proceeding, Iowa law is determinative.

2. Appeal and error ⇨839(1)

In deciding case wherein Iowa law was determinative, but no Iowa statute law was cited in trial court or on appeal, reviewing court would consider the case in light of Iowa cases cited.

3. Banks and banking ⇨77(2)

The separate assets of owner of a private bank in receivership do not immediately come under receiver's control when receiver qualifies, under Iowa law, but constitute a reserve fund for benefit of creditors whose claims in receivership are filed, from which no creditor may profit to detriment of other creditors or of receiver by recovering from owner individually while receivership is still pending.

4. Banks and banking ⇨76

California courts should recognize authority of Iowa court over claimants in Iowa proceedings for receivership of Iowa private bank, and follow Iowa laws as interpreted by Iowa Supreme Court in determining right of claimant to sue owner of private bank individually on bank's obligations.

5. Courts ⇨513

A holder of certificates of deposit issued in Iowa by Iowa private bank and payable in Iowa, who filed claims thereon with Iowa receiver of bank and accepted payments on account from receiver, thereby elected his forum and could not sue owner of bank individually in California, notwithstanding that Iowa court had not yet ordered receiver to sue owner for benefit of bank's creditors.

6. Action ⇨69

Where holder of certificates of deposit issued by Iowa private bank improperly

sued owner of bank individually in California while Iowa receivership proceedings wherein such holder had filed claims were still pending, court should stay proceedings until a reasonable time after either party should produce properly authenticated copy of proceedings terminating Iowa receivership, rather than render judgment in favor of owner.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by J. G. Leggate against James Porter, on certificates of deposit issued by a private bank owned by defendant. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

Walter L. Maas, Jr., of Bakersfield, for appellant.

Benjamin W. Henderson, of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover \$9,198.10 principal, besides interest, on four certificates of deposit issued by the Bank of Ocheyedan in Iowa. Defendant had judgment and plaintiff appealed.

The Bank of Ocheyedan was a private bank and was owned and operated by defendant. On September 2, 1930, the district court of Iowa in and for the county of Osceola appointed A. J. Salland receiver of the bank "with power and authority to conserve the assets of said bank, to convert said assets into cash when he believes the same necessary and to dispose of said assets without converting the same into cash under proper authority of Court and to perform such other duties as may become necessary and as directed by the orders of this Court."

The receiver qualified and entered on the performance of his duties. Claims were made in the receivership proceedings on the four certificates of deposit in question here. They were allowed and approved and the receiver paid three dividends on them totaling fifteen per cent of their face value. The receivership is still pending in the Iowa court and the claims have neither been released in nor withdrawn from that proceeding.

The main question presented for our decision is the right of plaintiff to pursue defendant in this action, he being the

sole owner of the bank, and to recover and collect a judgment against him, based on a liability of the bank, during the pendency of the receivership proceeding in which plaintiff had appeared and presented his claims and upon which he had been paid substantial dividends by the receiver.

[1,2] As the obligations on which this action is brought were made and are payable in Iowa, and as the receivership is pending in that state, it is obvious that reference should be had to Iowa law pertinent to the subject, *Sullivan v. Shannon*, Cal.App., 77 P.2d 498, as that law must be determinative of some of the issues presented here. No Iowa statute law is cited to us and none appears to have been cited to the court below. The Iowa statutes are not available to us here. We will, therefore, consider this phase of the case in the light of the citations to and the discussions of the Iowa law contained in the three cases decided by the supreme court of that state to which we have been cited. *Bierma et al. v. Ellis*, 212 Iowa 366, 236 N.W. 402; *Ellis et al. v. Citizens' Bank of Carlisle*, 218 Iowa 750, 251 N.W. 744; *Day v. Power et al.*, 219 Iowa 138, 257 N.W. 187.

[3] It would seem that private banks are permitted to operate in Iowa. Apparently they need not be incorporated. However, such a bank seems to have an entity separate and apart from that of its owner and to be something more than a fictitious name under which its owner may conduct a banking business. A receiver may be appointed to take over the assets of such a bank and to administer and wind up its affairs. During such process assets of the bank are in the custody of the court. Such custody does not include the separate assets of the owner not invested in the bank. However, such separate assets form a fund which can be used when necessary in liquidating the liabilities of the bank. Such funds of the owner may be resorted to by the receiver in a separate suit against the owner after authorization by the court. During the pendency of the receivership proceedings, and before their termination, a creditor of the bank who has filed and had allowed his claim in the receivership proceedings will not be permitted to obtain judgment against the owner for the amount of his claim. If, during such period, he sues the owner his suit will be abated (not dismissed) until such time as

the receivership proceedings are concluded.

From the foregoing it would seem that the separate assets of the owner of the private bank do not come under the control of the receiver at the time when he is appointed and qualifies. They do, however, constitute a reserve fund to which resort may be had to pay the liabilities of the bank upon which the receiver may draw, if necessary to liquidate the bank's debts. Thus they should be regarded as a fund for the benefit of all the creditors who have approved claims filed in the receivership. During the receivership proceedings each such creditor should have an equal proportionate benefit from this fund and no one such creditor should profit from it to the detriment of other creditors or the receiver.

In the case of *Ellis v. Citizens' Bank of Carlisle*, supra, it appears that a private bank was owned by a group of persons which the court denominated a partnership. The receiver was ordered to bring suit against these owners to secure funds with which to liquidate the bank's liabilities. Such a suit was filed but was never brought to trial. Instead, a compromise was effected between the owners and the receiver which was approved by the District Court. In upholding the procedure, the supreme court of Iowa said (page 746):

"Has the district court wherein the receivership is pending power to authorize the receiver to compromise these claims with the respective partners at an amount less than the amount actually due thereon? The appellants argue that the title and ownership of their various deposit claims, together with the right to enforce or release same as against the various partners of said bank, is an individual personal right of such depositor against the individual partner. They are probably justified in this position, but this does not answer the question. Under our holding in the former appeal, they went into the equity court and submitted themselves to its jurisdiction in the receivership matter, and, having done so, they are subject to all the rights and powers that an equity court possesses under such circumstances and whatever order the court properly makes under such circumstances is binding on them. * * *

"Under the Iowa practice, the receiver is appointed in an equity court and is an

arm of the court. By the filing of their claim with the receiver and having same approved by the receiver, appellants, together with all other depositors and all parties concerned in the case, are before such court, and all their claims, whatever they may be, are within the jurisdiction of such equity court, and appellants are bound by the finding of such court determining their respective rights."

The case of *Bierma v. Ellis*, supra, involved the liquidation through receivership of the same insolvent bank. Several creditors of the bank whose claims had been filed and allowed in the receivership proceeding, sued the owners of the bank on their demands. These suits were dismissed in the trial court. In discussing this situation, the supreme court of Iowa said (page 405):

"The case presents an unusual and exceptional situation. A court of equity had acquired jurisdiction of the partnership and of all of the partners. The partnership was insolvent, and dissolution thereof was sought. A receiver was appointed and was specifically clothed with authority to not only sequester the assets of the partnership and apply them upon the debts of the partnership, but also to proceed to collect from the various partners any deficiency that might remain to satisfy the claims in full of all creditors of the partnership. Under order of court, due notice was given to claimants to file their claims, and the appellants came into said proceeding and filed their claim, which has not been withdrawn or dismissed. They thereby subjected themselves to the jurisdiction of the court in said receivership matter, and sought their relief under the conditions then existing in regard to said receivership matter. We think, in view of the peculiar situation disclosed in this case, that the appellants have elected their remedy, and that in any event the court should have entered an order as prayed in the intervener's petition staying and abating the prosecution of appellants' independent action against the individual partners until the completion of the proceedings in the receivership case.

* * *

"The record shows that the appellants, as plaintiffs, stood upon the ruling on their motion or demurrer to the petition of intervention, and thereupon the court entered an order dismissing the appellants' petition. Such order should not have been

entered under the circumstances, and should not constitute a bar to further prosecution of appellants' cause of action should occasion arise therefor. The order should have been an order in abatement as prayed by the intervener abating the appellants' cause of action until the final determination of the action in which the receiver was appointed. The practical result, however, may be the same."

In discussing election of remedies in *Martin Music Co. v. Robb*, 115 Cal.App. 414, 1 P.2d 1000, it was said (page 1003):

"Referees in bankruptcy are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against the bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially. The allowance of the claim is an adjudication of all issues properly presented for determination and constitutes a final judgment which is binding upon both the creditors and the bankrupt. 7 C.J. 323, § 529.

"Appellants having filed a claim in the bankruptcy proceedings and it having been allowed in the full amount of the contract price by the referee, this decree or order allowing the claim of appellant was final. The case of *Elmore Quillian & Co. v. Henderson etc., Co.*, 179 Ala. 548, 60 So. 820, 43 L.R.A.(N.S.) 950 citing *Cromwell v. County of Sac.*, 94 U.S. 351, at page 371, 24 L.Ed. 195, definitely held that a decree of the trustee in bankruptcy ordering the allowance of a claim arising under a contract to be a bar to a subsequent suit on the contract and operated as an estoppel."

In the case of *Strain v. Superior Court*, 168 Cal. 216, 142 P. 62, Ann.Cas.1915D, 702, it appears that a receiver was appointed to take possession of the property of the California Development Company, part of which was in California and part in Mexico. Strain and others interfered with the receiver's possession of the Mexican properties. The trial court punished them for contempt. In holding that the trial court had jurisdiction to punish a contempt where the act constituting it was committed without the jurisdiction of the trial court and in a foreign country, our Supreme Court said (page 64):

"It appears that the petitioners, though not parties to the action wherein Holabird had been appointed receiver, were nevertheless residents within the territorial

jurisdiction of the court when the alleged interference with the Holt Canal took place, and were such when this proceeding in contempt was commenced against them.

"It is the duty of a court appointing a receiver to protect him in the discharge of his duties and in the control and possession of the property in his custody, as such against any one interfering therewith, whether a party to the proceeding in which the receivership is created or not, and the jurisdiction of the court to do this is not affected by the fact that the act of interference was committed, as in this case, outside the territorial jurisdiction of the court, if the alleged offenders are within its territorial jurisdiction. High on Receivers, 4th ed., § 164; Smith on Receivers, § 47; Chafee v. Quidnick Company, 13 R.I. 442; Richards v. People, 81 Ill. 551; Sercomb v. Catlin, 128 Ill. 556, 21 N.E. 606, 15 Am.St.Rep. 147.

"No question is made here but that the court had jurisdiction over the persons of petitioners in this proceeding, and, if the act charged to have been committed by them constituted an interference with the duties of the receiver respecting the property in his control and possession as such, then, under the authorities just cited, they were subject to punishment by the superior court, and its action in that respect was justified."

[4] As a converse to the foregoing rule it should follow that California courts should recognize the authority of the Iowa court over the claimants who appeared in the receivership proceedings and follow the laws of Iowa governing this situation as those laws are interpreted by the Supreme Court of that state.

[5] We have reached the conclusion that plaintiff, by filing his claims with the receiver, having them approved by him and accepting payments on account from him, has elected his forum and must be held to the remedies it affords. It is true that the receiver has not been ordered to sue defendant for the benefit of the bank's creditors but if such suit be necessary it may be ordered by the Iowa court.

[6] In electing his forum plaintiff should not be held to any greater limitation on his action here than is imposed by the Iowa law, which seems to permit a suit by the creditor of the bank against its owner during the pendency of the receivership proceedings and a judgment in

the creditor's favor after the termination of the receivership if the claims are not fully paid in that proceeding. If the judgment before us is permitted to stand in its present form it will be a bar to any future action in California between the parties should the plaintiff desire to press his claim against defendant at a future date after the receivership proceedings have been terminated in Iowa.

The judgment is reversed with directions to the trial court to stay further proceedings until a reasonable time after either party shall produce a properly authenticated copy of the proceedings of the district court of the state of Iowa in and for the county of Osceola terminating the receivership proceedings herein referred to and thereafter to take such proceeding in this action as may be appropriate and according to law.

We concur: BARNARD, P. J.; JENNINGS, J.



26 Cal.App.2d 524

WHITE v. WHITE et al.

Civ. 5993.

District Court of Appeal, Third District,
California.

May 24, 1938.

Rehearing Denied June 23, 1938.

1. Divorce ⇨253

In wife's action to set aside property settlement agreement entered into upon granting of interlocutory decree of divorce, trial court had jurisdiction to render a personal judgment in favor of the wife against the husband for such amount as was disbursed by him from the community funds and not satisfactorily accounted for at the time of divorce.

2. Husband and wife ⇨272(5)

Where the handling of community funds is intrusted by law to the husband, husband must take precaution to keep an approximately accurate account of disbursements and to keep segregated the community and the separate funds of the parties or to take legal consequences of being unable to satisfactorily account therefor.

3. Evidence $\hookrightarrow$ 28

In proceeding to effect a division of community property in existence at time of entering interlocutory decree of divorce, testimony of husband's bookkeeper that all disbursements of the husband were entered in a black book which was removed by husband and not produced among exhibits before referee gave rise to presumption that evidence suppressed would be adverse if produced.

4. Divorce $\hookrightarrow$ 253

In proceeding to effect a division of community property which was in existence at time of filing of interlocutory decree of divorce, where husband was found to have community property in his possession which he failed or refused to disclose, a personal judgment against husband was proper.

5. Husband and wife $\hookrightarrow$ 262(1)

A husband who had large separate estate as well as community funds would be presumed to have made gifts to parents out of separate property and not from the community.

6. Husband and wife $\hookrightarrow$ 268(1)

Where husband prior to marriage bought ring for wife, which ring he paid for after marriage, husband who had separate property in addition to community property was obligated to pay for ring out of his separate property.

7. Appeal and error $\hookrightarrow$ 80(4)

An interlocutory judgment setting aside property settlement, made at time interlocutory decree of divorce was granted, and appointing a special master to determine amount of community property at time of divorce, and wherein court reserved decision until master's report showing how community property was to be divided, was not a "final judgment" from which an appeal might be taken.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

8. Appeal and error $\hookrightarrow$ 66

There can be but one final judgment in an action from which an appeal may be taken.

9. Divorce $\hookrightarrow$ 253

In proceeding to set aside a property settlement agreement entered into upon granting of interlocutory decree of divorce and wherein it was requested that certain

transfers of community property by husband be set aside for fraud and that court make division of community property, court had jurisdiction to appoint receiver of property and to make a division of the community property as of the time of the divorce.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Pauline Starke White against Jack White and others to set aside a property settlement agreement between plaintiff and named defendant, entered into at time plaintiff obtained an interlocutory decree of divorce, wherein settlement was set aside and a receiver appointed and a special master appointed to take evidence as to community property at time of divorce. From an adverse judgment, defendants appeal.

Affirmed.

H. A. Goldman and Thomas C. Ridgway, both of Los Angeles, for appellants.

I. B. Kornblum and Spencer Austrian, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Pauline White and Jack White were married in 1927, and lived together as husband and wife until 1931, when an action for divorce was instituted by Pauline White, respondent herein, resulting in an interlocutory decree of divorce. At that time a property settlement agreement was entered into between the parties, but later this action was commenced by respondent seeking to set aside this agreement, claiming that the same did not give her a fair share of the community property.

Appellant filed an answer admitting that the property settlement agreement was unfair, claiming, however, that it was unfair to him in that it gave to respondent more than her share of the community property, and alleging that his signature was secured thereto by coercion.

A motion for judgment on the pleadings was granted upon the ground that the parties to the action sought the same relief, and the property settlement was set aside and a receiver was appointed to take charge of the community property. At the same time the court also appointed a special master to take evidence as to what was the community property at the time of the

divorce, and to recommend an equal division thereof.

At the time of the divorce appellant White contended that the only community property in existence consisted of cash in the bank, wages due respondent from a former employer, and certain insurance policies in the hands of appellant. However, the court awarded a judgment in favor of respondent and against appellant for the sum of \$9,135.75 with interest. This amount the court determined from the following facts:

First: A few days prior to the marriage appellant purchased for his prospective wife a diamond engagement ring and a wedding ring upon a written contract of purchase, under the terms of which he agreed to pay for the jewelry in monthly installments. These payments were then made by him after his marriage out of his salary. Appellant attempted to charge these payments against the community but the court held these payments were made from his separate estate.

Second: During the marriage each of the parties supported their respective parents, appellant giving his parents on the average of \$75 per week, aggregating over a period of the married life of the parties in excess of \$14,000. These payments likewise were held to be chargeable against appellant's separate property.

Third: During marriage appellant drew in excess of 200 checks to cash, ranging in amounts from \$1 to \$500. No explanation satisfactory to the court was made as to the uses of these amounts.

Fourth: Appellant withdrew from his bank account by countercheck after the commencement of the divorce action \$1,650. This was held to be community property.

Neither party kept complete books and apparently the special master had considerable difficulty in determining the respective property rights of the parties. It did appear that appellant had the control of community funds and comingled the community funds with his separate estate.

It also appears both parties were employed in the picture industry, and during the marriage each was in receipt of considerable income, approximately \$500,000 for the four years of marriage. At the time of the property settlement, however, all plaintiff had was a piece of residence property acquired prior to marriage and certain household furnishings, jewelry, an au-

tomobile, a small amount of cash in the bank, and some \$2,000 owing plaintiff for services as a picture actress during the existence of the community. The only property accounted for by defendant at the date of the divorce was some seven parcels of real property, largely encumbered and standing of record in the names of certain of his relatives; certain household furnishings, an automobile and a small amount of cash in the bank.

It appeared that appellant White had expended considerable sums which he had used in the development of his separate property, but during the hearing respondent elected to waive any claim she might have to the realty itself as community property, and demanded that appellant return to the community for division all community funds which he had thus invested in his separate property.

Counsel for defendant contends that the limit of the court's jurisdiction in this action is to decree what interest, if any, plaintiff has in those tangible items of property remaining in defendant's hands or under his control at the time of the divorce, and that the court had no jurisdiction to enter a personal judgment in favor of plaintiff for monies which the accounting showed were disbursed through his hands, regardless of the fact that no satisfactory accounting has been made by him of such funds.

[1] The trial court held, and we think correctly, that it had jurisdiction to render a personal judgment in favor of one party against the other for such amount as was disbursed by the other party from the community funds and not satisfactorily accounted for. The referee cited instances in which it was apparent not only to him but it was also later obvious to the court that defendant was evasive and apparently attempting to mislead the court. For example appellant filed an affidavit at the time of the divorce proceedings in regard to his financial status in which he stated he had no money, but the record disclosed that he had withdrawn \$7,000 in cash from his bank and delivered the same to his mother. When interrogated upon this item, defendant's mother stated that she had received the money from the defendant in trust for him and that she had then returned it to him, and that it was not in repayment of a loan as claimed by appellant and that he did not owe her any money at the time. Defendant, upon being interrogated upon this point, recalled withdrawing the \$7,000 and stated

that he had spent it but could not recall in what manner. Also it appears that defendant set forth in his affidavit previous to the divorce action, relating to his financial condition that he had on deposit \$1,650, but a few days later he withdrew this amount from his bank. Other instances appeared where defendant claimed payments for certain community expenses but on cross-examination it developed they had not been expended for the community nor in payment of the items claimed. Upon such testimony the referee reached the conclusion that defendant had deliberately misstated the facts. It also appeared that at one time all the records of both parties, such as canceled checks, bank check stubs, receipted bills, etc., were in a container at the residence of the parties, but after these parties separated these records were in the possession of defendant, and were moved by him from place to place and were handled by various of his attorneys, but at the hearing before the referee a number of these records were missing, particularly a number of the checks claimed to have been drawn for the community benefit were missing, while the checks to named payees during the same period were produced.

[2] Where the handling of the community funds is entrusted by law to the husband, a certain amount of precaution devolves upon him to keep an approximately accurate account of their disbursements and to keep segregated the community and the separate funds of the parties or to take the legal consequences of being unable to satisfactorily account therefor.

The referee found that after considering all of the checks produced at the examination, and a study of the books and accounts of appellant there was still a large sum not accounted for, for which defendant had not satisfactorily accounted.

The findings of the referee are in accordance with the evidence, which findings were later adopted by the trial court. Upon appeal from the judgment entered thereon appellant, Jack White, contends that an action to divide the community property affects only property actually in existence at the termination of the community. It is apparently the conclusion of the trial court that the money still remained under the control and in the possession of White or his associates at the time of the entry of the decree, and had not been actually expended.

[3,4] The bookkeeper of White testified that a black book in which she kept a

record of all the disbursements of White, and which was a part of the office records, was not among the exhibits before the referee. Another witness testified that he helped White remove the office files from the home of plaintiff and defendant and took them to the home of the parents of White, where they remained until White removed them. Upon such testimony a presumption arose that evidence unlawfully suppressed would be adverse if produced. As authority for the rendering of a personal judgment for community funds against the husband in a separate suit, we may rely upon *Provost v. Provost*, 102 Cal. App. 775, 283 P. 842; *Van Camp v. Van Camp*, 53 Cal.App. 17, 199 P. 885; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 P. 360, which supports such an order.

[5,6] In regard to the comingling of the community and separate funds in his attempt to improve his separate estate and to offset community monies, appellant attempted to charge to the community all items actually expended by him relying upon the rule that the expenditure of community funds by the husband is not subject to question. This is illustrated by his gift of money to his parents from the comingled funds totaling over \$14,000. The trial court held that where the husband has a large separate estate as well as community funds, gifts made to his parents out of such comingled funds will be presumed to have been from the appellant's separately owned property and not from the community. Likewise in regard to the ring purchased before the marriage which he gave to respondent, the purchase price of which, however, was paid by appellant after marriage, the trial court held, and we think correctly, that when appellant purchased the ring before marriage the ring became his separate property and he was obligated to pay for it out of his separate property, and his gift of the ring to respondent constituted a gift as his separate property regardless of the subsequent marriage of the parties.

Upon the setting aside of the property settlement the trial court entered what it termed was an interlocutory decree directing the appointment of a special master to determine the facts and providing that after the filing of the report by the special master that a final judgment be entered.

[7] It is the contention of appellant that the interlocutory decree constituted the final judgment except perhaps the taking of an inventory of the property found by

the master to belong to the parties, and that the time for an appeal has expired. An examination, however, of the interlocutory judgment reveals that the court retained jurisdiction of the case for the purpose of hearing the report of the special master to grant such relief as might be necessary to a complete disposition of the action. It appears evident from the order that it was the intention of the court to reserve its decision dividing the community property until the master had heard all the evidence and made a report showing the property to be divided, as well as the transactions between the parties, the location of the community assets and the recommendation as to what constituted a fair and equitable division.

[8] While there is some conflict of authority on the question as to whether a decree which settled the basic interest between the parties adjudging the complainant's right to an accounting and referring the finding of the items of the account to the master is an appealable order, we are satisfied from an examination of the authorities that the rule adopted by the courts of this state is based upon the desirability of subjecting the parties to but one appeal at the termination of the entire controversy between them. *Gunder v. Gunder*, 208 Cal. 559, 282 P. 794; *Doudell v. Shoo*, 159 Cal. 448, 114 P. 579; *Gianelli v. Briscoe*, 40 Cal. App. 532, 181 P. 105; *Bancroft Code Practice and Remedies*, p. 8329; *Pomper v. Superior Court*, 191 Cal. 494, 216 P. 577; *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938.

[9] Appellant also claims that respondent did not seek in her complaint to set aside any transfer made by the husband nor to seek a return of any gift, or ask for any accounting of any funds belonging to respondent. However, a reading of the complaint shows that not only was a recovery sought against defendant White but that in addition thereto the court was requested to set aside the transfer of the community property by White to other defendants, it being alleged that defendants other than appellant White had taken certain property belonging to the community. The prayer of the complaint also asked that it be adjudged that the transfers to defendants be declared fraudulent, and that the court make such division of the community property as may be just, and direct the payment thereof to plaintiff, and asked that a receiver be appointed and that defendants be required

to account for and transfer the same to the receiver.

Appellant also claims that neither the separate property of the husband nor wife can be charged with any community rights and that the courts have no jurisdiction to apportion or to set aside to either party any part of the other's separate property. With this respondent has no quarrel, but contends that where appellant has been found to have community property in his possession which he fails or refuses to disclose, a personal judgment against him for one-half of the amount of such community funds is not a division of a separate estate, but merely a division of the community funds which the court has found to be in existence but withheld.

We believe that we have answered the various points urged. It is our opinion that the trial court correctly decided his rather confused matter.

The judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



26 Cal.App.2d 483

KERN COUNTY FINANCE CO. v. IRIART
et al.
Civ. 1894.

District Court of Appeal, Fourth District,
California.

May 20, 1938.

Hearing Denied by Supreme Court
July 18, 1938.

1. Jury ☞ 131(15)

Where a juror on voir dire admitted that he had a business transaction with plaintiff corporation more than five years before the trial, the sustaining of objection to a question as to what was the nature of the business was proper because of remoteness, especially where the court offered to let counsel go into the question as to whether the matter would have any influence on the case.

2. Jury ☞ 131(15)

Where a juror on voir dire said he belonged to fraternal organization to which some of the men in plaintiff corporation belonged, sustaining of objection to question

as to which of the men belonged to the organization was not error, where the court offered to permit counsel to ask whether any officer of the corporation belonged to the organization.

3. Appeal and error ⇨1045(1)

Jury ⇨131(15)

In action on note where juror admitted that he had himself sued on a note, at a time prior to a year before the trial, the sustaining of objection to question as to how many notes the juror had sued on was neither erroneous nor prejudicial.

4. Trial ⇨59(2)

In action on note, the rejecting of makers' offers of proof made during cross-examination of president of payee corporation was not an abuse of discretion, where a lengthy cross-examination had been allowed and the court stated that the matters contained in the offers of proof might be gone into in the makers' own case.

5. Bills and notes ⇨501

In action on note, the exclusion of certain record book, which had been furnished one of the makers by the payee which had been the maker's employer, was proper, where the contents of the books were largely immaterial and the matters sought to be proved were covered by other evidence.

6. Bills and notes ⇨501

In action on note, the exclusion of evidence that a certain witness was friendly to the payee corporation was not error, where excluded evidence would have been cumulative.

7. Trial ⇨18

The commitment of counsel for a party to jail for contempt for one night during the course of the trial was not prejudicial, where commitment was not made in presence of the jury, only adjournment sought by counsel on day following the commitment was granted, counsel did not request a continuance, and claimed incapacity of counsel resulting from loss of sleep because of the commitment was not otherwise called to the court's attention.

8. Trial ⇨228(3)

In action on note, the fact that in instruction defining "consideration" commas were omitted by the court who read certain statutes to the jury did not render the instruction objectionable. Civ.Code, §§ 1605, 1606.

9. Trial ⇨260(1)

The refusal of an instruction was not error where the refused instruction was adequately covered by a given instruction.

10. Appeal and error ⇨1067

Trial ⇨187(1)

The refusal of instruction, that a witness may be impeached by the party against whom he is called by contradictory evidence or by evidence of the witness' previous statements inconsistent with his testimony at the trial as to a material matter, was error, but did not require reversal.

11. Appeal and error ⇨757(4)

The District Court of Appeal in determining whether refusal of requested instructions required reversal would consider fact that refused instructions were not printed in appellants' brief, and fact that the appellants did not comply with court rule by setting forth in their brief all other instructions bearing upon the same subject. Court Rule 8, § 3.

12. Appeal and error ⇨659(3)

The District Court of Appeal denied motion for diminution of the record, where the appellants sought to have all exhibits received in evidence and all documents marked for identification brought up on the ground that it would have been very expensive to have included them in the record.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by the Kern County Finance Company against Jack Iriart and another on a promissory note. From an adverse judgment, the defendants appeal, and from an order denying a new trial, the defendants attempt an appeal.

Judgment affirmed, and attempted appeal from order denying new trial dismissed.

Arthur E. Schifferman, of Los Angeles, for appellants.

Brittan & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action on a promissory note for \$1,000 with interest at 10 per cent, dated November 14, 1934, payable on demand and signed by both defendants. The action was filed on July 6, 1936, and in their answer the defendants admitted

execution of the note by failing to deny the same, denied that there was any consideration, and, as an affirmative defense, alleged that for some time before and after November 14, 1934, the defendant James Iriart was employed by the plaintiff to purchase automobiles for it, that the \$1,000 represented by the note was advanced to him as a revolving fund to be used in purchasing automobiles for the plaintiff and its agents and for expenses incidental thereto, and that said sum had been expended by him for the benefit of the plaintiff and fully accounted for. At the trial the plaintiff made formal proof of the execution of the note, delivery of the \$1,000, demand for payment, and failure to pay. The remainder of the trial, which occupied five days, was consumed with the defense set up in the answer. The defendant James Iriart testified that he had unfortunately lost his account showing what he had done with the money. However, considerable opportunity was afforded the defendants to establish their defense in other ways, as shown by the time consumed in the trial and the length of the transcript, which contains nearly 500 pages. A jury returned a verdict in favor of the plaintiff and this appeal followed the judgment.

[1-3] It would be impracticable and serve no useful purpose to consider in detail all of the many points raised by the appellants. It is first urged that they were unduly restricted on their voir dire examination of prospective jurors. In several of the instances complained of it fully appears that the court permitted the questions to be asked and answered. In one case a juror said he was not indebted to the respondent or to any of its members but that he had had a business transaction with that corporation more than five years before. An objection to a question as to what was the nature of that business was sustained. Not only was this matter rather remote, but the court offered to let counsel for appellants go into the question as to whether that old matter would have any influence on the present case. It further appears that the appellants challenged this juror and he did not sit in the case. A juror said he belonged to a fraternal organization to which some of the men in the respondent corporation belonged. An objection was then sustained to the question as to which of "these gentlemen" belonged to the

organization, although the court offered to permit counsel to ask whether any officer of the respondent corporation belonged to the same organization. Not only does it appear that sufficient information was brought out to show the possibility of prejudice, but the juror in question was excused by the appellants. In the only other matter which need be referred to a juror was asked if he had ever sued anybody on a promissory note. He replied that he had. When asked whether he had done so within the last year or so he replied that it was "longer than that". He was then asked how many notes he had sued on and an objection was sustained. It neither appears that the ruling was erroneous nor prejudicial. The record discloses that a rather unusual opportunity for the examination of prospective jurors was afforded the appellants.

[4] It is next urged that the court erred in rejecting a number of offers of proof of material evidence on the part of the appellants. In a number of the instances set forth in this connection the offers of proof were made during the cross-examination of the president of the respondent corporation, following his testimony in the formal proof of execution and non-payment of the note. A lengthy cross-examination had already been allowed and in sustaining objections to and rejecting these offers of proof the court stated that these matters might be gone into in the appellants' own case. In most, if not all, of these instances this was done. The court merely exercised a reasonable discretion in controlling the order of proof and no error or prejudice appears.

[5, 6] The appellants offered in evidence a record book which had been furnished James Iriart by the respondent and which had been kept by Iriart with the exception of the first item which had been entered by the respondent. An objection to this was sustained. If this book contained everything that counsel said it did it was valueless on the question before the court. Not only were the contents of the book largely, if not entirely, immaterial, but all of the matters which counsel said he wanted to prove by this book were gone into over and over again through letters and telegrams and oral evidence. The appellants offered to introduce into evidence the complaint and other documents in a suit for damages for personal injuries which had been brought in Indiana and an objection

was sustained. It was and is appellants' contention that the respondent brought the present action as a matter of spite after that corporation had been joined as a party to the Indiana suit. The fact that such an action had been brought in Indiana, and many pages of testimony concerning it, were admitted in evidence, and the particular documents here in question could have had no effect upon the result in this case. Error is assigned in the rejection of an offer of proof to the effect that a certain witness was friendly to the respondent. The fact of such friendship had already been abundantly shown and the court properly excluded evidence which would have been merely cumulative. The last contention under this point is that the court refused to permit the appellant to prove that Jack Iriart, who is the father of James Iriart, had borrowed large sums of money at a lower rate of interest at about the time this note was given. It is argued that this would have shown that he would not have agreed to pay 10 per cent. interest. He signed the note for his son in connection with his son's business and probably did not expect to have to pay it. The fact that he was already largely indebted might well explain the necessity for a higher interest rate on a further loan. In view of the limited offer of proof and the possibilities involved it cannot be held that this evidence was of sufficient materiality to have affected the result, even if it be assumed that it was admissible.

[7] It is next urged that the appellants were denied a fair trial because at the close of the first day the trial judge committed their counsel to jail until 7 o'clock a. m. on the next day for contempt of court. This followed this counsel's repeated failure to obey the orders and admonitions of the court and his insistence upon continued arguments after rulings had been made, and after he had been fully and completely warned as to what would happen if he persisted in his conduct. While we are not here concerned with the merits of the order thus made it may be observed that the trial judge displayed a marked degree of patience before taking such action. The sentence for contempt was not made in the presence of the jury and the only prejudice sought to be shown is that counsel's loss of sleep, occasioned by his confinement over night in jail, rendered him incapable of properly presenting his defense the next day. In support of this claim our attention is called to the fact that on the following

day counsel asked for an adjournment for the noon recess at ten minutes of twelve, stating to the court that he was half asleep. An adjournment was then taken until two o'clock. No other request for an adjournment or continuance was made and the claimed incapacity of counsel was not otherwise called to the court's attention. The record indicates no lack of zeal and energy on the part of counsel, even after his commitment to jail, and no prejudice appears.

It is next contended that the trial court displayed favoritism toward the respondent "in failing to instruct the jury upon request, failing to censure nonresponsive witnesses upon request, and in permitting respondent's counsel to persist in leading his witnesses". Twenty-five pages of the opening brief are devoted to this point, including lengthy quotations from the transcript, none of which indicates any partiality on the part of the trial judge.

It is next urged that the court erred in ruling upon the admission of evidence in some dozen instances. Some of these were trivial, in some the evidence in question was admitted at another time, and in none is either error or prejudice disclosed. The record and briefs are voluminous on these points and no useful purpose would be served by considering these matters in detail.

[8-11] It is finally urged that the court erred in "the treatment of the jury instructions". The giving and refusing of twelve instructions are attacked under this head, most of which deserve no consideration. As an example, in defining "consideration", the court read to the jury sections 1605 and 1606 of the Civil Code. The objection urged against this instruction is that "fourteen of the commas which the legislature considered necessary to give these code sections meaning, have been omitted altogether". Further comment is unnecessary. In one instance it is stated that the court erred in deleting certain matter from an instruction. In the instruction, to which reference is made by page and line of the transcript, nothing is deleted. One instruction which it is said should have been given was adequately covered by another instruction which was given. Complaint is made of the refusal of the court to give an instruction to the effect that a witness may be impeached by the party against whom he is called by contradictory evidence or by evidence that he has made, at other times, statements inconsistent with his present tes-

timony as to a material matter, although it is not pointed out where any particular impeachment here occurred. We think, however, that the instruction should have been given, but no reversible error here appears. *People v. Plumeyer*, 54 Cal.App. 786, 202 P. 888. A further consideration is that the refused instructions are not printed in appellants' brief and in no instance have the appellants complied with section 3 of rule VIII by setting forth in their brief all other instructions bearing upon the same subject.

The testimony given by the appellant James Iriart was in itself sufficient to justify the jury in rejecting the defense offered by him and while it may be conceded that some minor errors appear in this lengthy trial they are not sufficient to justify a reversal. The case was fairly tried and the trial court was extremely liberal in allowing evidence in support of the claimed defense.

[12] When the cause was called for oral argument the appellant moved for diminution of the record, asking to have all exhibits received in evidence and all documents marked for identification brought up, on the ground that it would have been very expensive to have included them in the record. After due consideration the motion is denied.

The attempted appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



26 Cal.App.2d 468

TUCK v. GUDNASON.

Civ. 10652.

District Court of Appeal, First District,
Division 2, California.

May 20, 1938.

1. Appeal and error — 1012(1)

The trial court's findings, based on evidence not inherently improbable, must stand on appeal, as reviewing court will not weigh evidence for purpose of reversing trial court on facts.

2. Appeal and error — 931(1)

It is appellate court's duty to reconcile trial court's findings so as to support judgment appealed from whenever possible.

3. Appeal and error — 110

An order denying motion for new trial is not appealable.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Elsie C. Tuck against Krist Gudnason to recover damages for breach of an oral contract. Judgment for defendant, and plaintiff appeals.

Affirmed.

Snook & Snook & Chase, of Oakland, for appellant.

Decoto & Hardin, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought damages for alleged breach of contract. Upon the first trial, a judgment of nonsuit was entered in favor of defendant. Said judgment was reversed on appeal. *Tuck v. Gudnason*, 11 Cal.App. 2d 626, 54 P.2d 88. Thereafter, a second trial was had before the court sitting without a jury. The trial court made findings in favor of defendant and judgment was entered accordingly. Plaintiff appeals from said judgment.

The pleadings and the evidence most favorable to plaintiff are sufficiently set forth in the opinion on the former appeal. *Tuck v. Gudnason*, supra. Upon the second trial said evidence was flatly contradicted in practically all of its material aspects. The trial court found against the existence of the oral agreement alleged and testified to by plaintiff and further found, in accordance with the testimony of defendant, that defendant merely agreed to do certain things for plaintiff to assist her in expanding her facilities for making dresses, in return for which plaintiff agreed to give defendant preference over other customers in promptly making and delivering dresses ordered by defendant from plaintiff. There was a direct conflict in the evidence regarding the terms of the oral agreement between the parties and there was ample evidence to sustain findings supporting either plaintiff's version or defendant's version of the alleged agreement.

[1] Appellant's contention on this appeal is stated as follows: "The evidence

does not support the findings and judgment of the trial court to the effect that these parties did not make the agreement as alleged in that there is no substantial conflict in the evidence when it is analyzed in the light of the admitted facts giving consideration to the motives and propensities which tend to influence and prompt human action and to the inherent, improbabilities of the defendant's evidence, as well as to the inconsistencies appearing in the findings themselves." We find no merit in this contention.

In support thereof appellant bases her argument on the evidence most favorable to appellant. In reply, respondent bases his argument on the evidence most favorable to respondent. We find nothing inherently improbable in the evidence introduced on behalf of respondent. On the contrary, if we give "consideration to the motives and propensities which tend to influence and prompt human action", it seems improbable that experienced persons in business would enter into any such agreement as was alleged by appellant without some written memorandum of its terms. As there was no inherent improbability in the evidence upon which the findings were based, said findings must stand, for it is well settled that a reviewing court will not weigh the evidence for the purpose of reversing a trial court on the facts. There being a substantial conflict in the evidence, appellant's quotation from the language found in the opinion in *Herbert v. Lankershim*, 9 Cal.2d 409, 71 P.2d 220, 94 Cal.Dec. is inapplicable here.

[2] The above-mentioned contention makes reference to alleged inconsistencies in the findings. We find no inconsistencies in the findings when they are read as a whole. It is entirely clear from the findings that the trial court found against the existence of the oral agreement claimed by appellant and in favor of the existence of the oral agreement claimed by respondent. On numerous occasions, the terms the "agreement alleged in the complaint", "the agreement", "the contract" and "said agreement" are used in the findings. It is not difficult to harmonize the findings when the particular term used by the trial court in each instance is referred to the claimed agreement which the trial court obviously had in mind in using the term in that instance. The findings may therefore be easily reconciled so as to support the judgment and it is the duty of an appellate court to so reconcile findings whenever possible.

Lasher v. Faw, 209 Cal. 726, 289 P. 821, *Hartford v. Pacific Motor Trucking Co.*, 16 Cal.App.2d 378, 60 P.2d 476; *Vila v. Brovelli*, 3 Cal.App.2d 713, 39 P.2d 855.

[3] Appellant gave notice of appeal from the order denying the motion for new trial as well as from the judgment. As no appeal lies from such order, the appeal therefrom should be dismissed. *Vila v. Brovelli*, supra.

The appeal from the order denying the motion for new trial is dismissed. The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



26 Cal.App.2d 533

In re **FIRST EXCHANGE STATE BANK.**

BORK et al. v. RICHARDSON, Superintendent of Banks.

Civ. 6047.

District Court of Appeal, Third District,
California.

May 24, 1938.

1. Banks and banking ☞80(2)

Where claimant sought to have claim against insolvent bank established as preferred, fact that proof of claim against insolvent bank as originally filed asserted no preference until superintendent of banks filed a petition and order to show cause directing payment of the claim as preferred was immaterial. Gen.Laws 1931, Act 652, § 136.

2. Banks and banking ☞80(3)

Under the Bank Act, power is vested in the court to determine what amount shall be paid to each claimant upon liquidation of an insolvent bank. Gen.Laws 1931, Act 652, § 136.

3. Banks and banking ☞80(3)

Payment of claims against an insolvent bank in liquidation need not be made in accordance with the demands expressed in the claims filed with the superintendent of banks nor with the action of the superintendent in rejecting or approving them. Gen.Laws 1931, Act 652, § 136.

4. Banks and banking $\S$ 80(3)

Upon liquidation of an insolvent bank, responsibility for the proper application of the net proceeds in liquidation is placed upon the court and not upon the superintendent of banks. Gen.Laws 1931, Act 652, $\S$ 136.

5. Banks and banking $\S$ 80(2)

Where superintendent of banks, in charge of liquidation of insolvent bank, had authorized payment of dividends on claims of all general creditors, dividends had been paid, and funds were insufficient to pay all creditors in full, claimants who amended their claims 3½ years later, so as to have claims given preference over general creditors, were not barred by laches or estoppel from having their claims established as preferred. Gen.Laws 1931, Act 652, $\S$ 136.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the First Exchange State Bank in liquidation, wherein Henry J. Bork and others filed petitions against Friend W. Richardson, Superintendent of Banks of the State of California, in charge of the liquidation of the First Exchange State Bank, to have petitioners' claims established as preferred. From an order and judgment favorable to petitioners, respondent appeals.

Affirmed.

Clock, McWhinney & Clock and Henry H. Clock, all of Los Angeles, and Merritt D. Jergins, of Long Beach, for appellant.

Henry H. Childress and Lazare F. Bernhardt, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order establishing certain claims as preferred, and directing the superintendent of banks in charge of liquidation to pay the same as such. The First Exchange State Bank hereinbefore referred to as the bank, was closed for liquidation by the superintendent of banks on January 14, 1932, pursuant to the provisions of section 136 of the Bank Act. (Deering's Gen.Laws, Act 652.) On July 19, 1934, Friend W. Richardson succeeded the prior superintendent of banks, and thereafter became and ever since has been superintendent of banks of the state of California.

We are here concerned with nine claims, seven being filed by the Bank of America National Trust and Savings Association, one by Henry J. Bork, and one by Miss Louie E. Raymond. The petitions on these claims were consolidated for hearing.

[1] Appellant makes some point of the fact that in the proof of claim filed by Bork no preference was asserted on his behalf until in May, 1935, at which time respondent filed his petition and order to show cause directing payment of his claim as preferred. The claims of the Bank of America were asserted as a preference at the time they were filed, as was likewise the claim of Miss Louie Raymond. In view of the principle enunciated in the case of *Burket v. Bank of Hollywood*, 9 Cal.2d 113, 69 P.2d 421, which we will later refer to, it is immaterial whether the claims were originally filed as preferred or general claims.

It is contended by respondents that all of the deposits in the possession of the bank at the time of the closing of its doors belonging to these petitioners herein were held for the benefit of petitioners, and as such constitute trust funds.

In November, 1932, November, 1933, and in October, 1934, in proceedings relating to matters in liquidation of the bank, payments of dividends were authorized by the superintendent of banks in the amounts of 10 per cent, 20 per cent and 10 per cent, respectively, on claims of all general creditors, including petitioners. In 1936 petitioners applied to the court for an order establishing their claims as preferred.

It is the contention of appellant herein that claimants were barred after a delay in amending their claims to have the same given preference and priority over general creditors of approximately three and one-half years, where dividends have been paid and there will not be sufficient funds to pay all creditors in full, asserting that such procedure was barred by section 136 of the Bank Act as amended in 1935, and that such delay had prejudiced the superintendent of banks in charge of liquidation so as to bar recovery, and that petitioners were guilty of laches and inexcusable neglect.

The pertinent provisions of section 136 of the Bank Act provide that all claims against a bank in liquidation must be presented to the superintendent of banks in writing within four months after the first publication of notice to creditors, and that if the superintendent of banks doubts the justice and va-

lidity of any claim, he may reject the same and serve notice of such rejection upon the claimant either by mail or personally. The affidavit of service of such notice shall constitute prima facie evidence of that fact. Any action upon a claim so rejected must be brought within six months after such notice.

The bank in support of its contention that claimants cannot delay amending their claims and have the same declared a priority, cites the case of *Ogan v. Farmers and Merchants Bank etc.*, 231 Mo.App. 11, 90 S.W.2d 438. An examination of the Missouri statute, however, discloses that the bank commissioner of Missouri was required within twenty days after expiration of the time to file claims, to approve or reject each claim, and endorse his approval or rejection thereon. The statute, after requiring the commissioner to so approve or reject all claims, specifically precluded him from determining priorities, and required the commissioner to present all claims in which priority was demanded to the circuit court, and expressly required the court to determine the priority of each claim. These particular provisions, the court said by implication, compelled the presentation of priority demands in the first instance to the commissioner, and a determination by the court of each claim before any order of distribution could be made. The Missouri statute provides that the commissioner shall approve or reject the claims, (sec. 5336, p. 7560, Mo.St.Ann.), and that where he has failed to approve a claim, action thereon may be commenced within six months after the time within which the commissioner is required to approve or reject the claim has expired. Mo.St.Ann. § 5337, p. 7560. Apparently no service of notice of rejection is required by the statute.

In the California statute there is no language specifically providing that the superintendent shall approve or reject claims or requiring him to submit priority demands as such to the court, nor is the court required to adjudicate rights to preference before any order of distribution is made. Under our statute the superintendent is not required to approve any claim, but if he chooses to reject a demand presented to him, the claimant has six months from and after notice of rejection within which to institute proceedings to establish the claim. Here it does not appear that any notice of rejection was ever served upon any of these claimants.

Under section 136 of the California Bank Act provision is made that claims against

a closed bank shall be filed with the superintendent, and upon the expiration of the time within which claims may be filed, the superintendent shall file with the court a full list of all claims presented, including such as have been rejected by him, and the court may then authorize a declaration of dividends, the same to be paid to such persons and in such amounts as may be directed by the court.

[2-4] From these provisions it is clear that the power is vested in the court to determine what amount shall be paid to each claimant. Payments need not be made in accordance with the demands expressed in the claims filed with the superintendent nor with the action of the superintendent in rejecting or approving the same. The court, in determining the amount to be paid each claimant, must of necessity determine the priority of each claim. The responsibility is placed upon the court and not upon the superintendent of banks for the proper application of the net proceeds in liquidation.

Respondent also urges that the delay of over three years in the amending of petitioners' claims had prejudiced the superintendent in effecting recoveries, also that petitioners are guilty of laches precluding them from preferential allowance.

In *Hammons v. National Surety Co.*, 36 Ariz. 459, 287 P. 292, it was said in a similar situation (page 296):

"The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due."

[5] In the case of *Burket v. Bank of Hollywood*, supra, the question of laches and also the question of estoppel was considered and determined adversely to the contention of appellant here. In fact that case, in our opinion, determines the principal questions here raised. There the superintendent of banks had taken over the Bank of Hollywood for liquidation. The question presented was whether Burket was entitled to payment of his claims in full and in preference to the claims of the general creditors of the bank. The claims were filed and allowed as general claims. Some four years after the filing of the general claims and after liquidating dividends had been paid, Burket delivered to the bank

amended claims, claiming preference over general creditors. The superintendent of banks refused to allow the amended claims. In an action brought thereon the trial court rendered judgment that the claimant was entitled to a preference, which judgment was affirmed by the Supreme Court. In its opinion the court held that the failure of the claimant to specifically state that a preference was demanded did not bar recovery, if the facts entitled the claim to payment before general creditors. The court also held that the delay in payment and preference had not prejudiced the superintendent of banks nor did it estop respondents from asserting a preference, saying the superintendent of banks had not been injured and the general creditors had lost no rights nor suffered any disadvantage by the acts of respondents.

The findings of the trial court here are adverse to the contentions of the bank, but are amply supported by the record.

The judgment and order appealed from must be affirmed, and it is so ordered.

I concur: THOMPSON, J.



26 Cal.App.2d 442

PEOPLE v. MORALES.

Cr. 363.

District Court of Appeal, Fourth District,
California.

May 19, 1938.

1. Homicide ⚡238

Under conflicting evidence as to intoxication, conviction of murder in the first degree was authorized as against contention that accused was so intoxicated that he was unable to form a specific intent to kill. Pen.Code, §§ 22, 189.

2. Criminal law ⚡53

Voluntary intoxication is never an excuse for crime. Pen.Code, § 22.

A. Homicide ⚡270

The weight to be accorded to evidence of intoxication and whether such intoxication precluded accused from forming a specific

intention to kill, which intent is a necessary element in murder of the first degree, are for determination of the trier of facts. Pen. Code, §§ 22, 189.

4. Criminal law ⚡829(1)

Where a trial judge properly covers the law on a subject in the instructions given to a jury, there is no error in refusing additional instructions requested by defendant on the same subject.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Jesus Morales was convicted of murder in the first degree, and he appeals.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

MARKS, Justice.

On January 1, 1938, defendant made an assault with a knife on Ynez Candelario from which the latter died a few days later. Defendant was convicted of murder in the first degree and sentenced to confinement in the penitentiary for life. He has appealed from the judgment and from the order denying his motion for new trial.

Defendant urges the following grounds for reversal of the judgment: (1) Defendant was so intoxicated that he was unable to form a specific intent to kill. (2) That the jury was not properly instructed concerning the effect of intoxication on intent. (3) That this court should reduce the offense from murder in the first degree to murder in the second degree.

[1-3] The evidence on the question of the intoxication was conflicting. In *People v. De Moss*, 4 Cal.2d 469, 50 P.2d 1031, the Supreme Court said (page 1033):

"Voluntary intoxication is never an excuse for crime. Section 22, Pen.Code; *People v. Burkhart*, 211 Cal. 726, 730, 297 P. 11. The weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. *People v. Murphy*, 1 Cal.2d 37, 40, 32 P.2d 635. As already indicated we cannot say from an examination of the

entire record that the defendant was so disordered mentally at the time of the shooting as to preclude the resulting homicide from being of that 'willful, deliberate and premeditated' character designated in section 189 of the Penal Code as murder of the first degree."

[4] The trial judge gave four instructions on the effect of intoxication on intent. Defendant requested three additional instructions on this subject, which were refused. Where a trial judge properly covers the law on a subject in the instructions given to a jury there is no error in refusing additional instructions requested by a defendant on the same subject.

Defendant's argument to this court to get us to reduce the degree of the crime is based on the assumption that he was too intoxicated to form an intent to kill. As we have seen, the evidence on this question was conflicting. The jury having resolved that conflict against defendant, we are bound by its decision. We can no more reduce the degree of a crime on conflicting evidence than we can reverse a judgment simply because of a conflict in the evidence.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



26 Cal.App.2d 506

CHIRGWIN v. CHIRGWIN.

Civ. 11409.

District Court of Appeal, Second District,
Division 1, California.

May 24, 1938.

1. Husband and wife ⇨285½

Separate maintenance without a divorce rests on the relation of husband and wife and a decree awarding such maintenance contemplates the existence of the marital relation during its life.

2. Husband and wife ⇨283(4)

An award of separate maintenance is terminated by a decree of divorce which contains no provision for support.

3. Divorce ⇨326

A divorce to one who has a bona fide domicile in a foreign state on constructive or substituted service of process may be recognized although such state is not the matrimonial domicile and divorce is not within the protection of the full faith and credit clause. Const.U.S. art. 4, § 1.

4. Appeal and error ⇨695(1)

On appeal on a bill of exceptions showing only a portion of the evidence, the findings of fact made by the trial judge are binding in so far as they are consistent with the written stipulation of facts and evidence in the bill of exceptions.

5. Divorce ⇨326

Husband and wife ⇨285½

Where husband left New York the day after personal service of process on him in an action for separate maintenance without answering and acquired a residence in Nevada and obtained a divorce there by constructive service before New York court awarded wife separate maintenance, California court was bound to recognize divorce granted in Nevada in the absence of an attack for fraud, and hence wife was not entitled to recover on New York judgment awarding maintenance, since such judgment could only be rendered during the marital status which was terminated by the Nevada decree.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Marie K. Chirgwin, substituted for Betty J. Kennedy, against Frederick H. Chirgwin for money due on a foreign judgment obtained in an action for separate maintenance. Judgment for defendant, and plaintiff appeals.

Judgment affirmed and appeal from order denying a motion for new trial dismissed.

Joseph I. King, of Los Angeles, for appellant.

Barker & Keithly, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in favor of the respondent in an action brought to recover money due on a foreign judgment, as well as an appeal from an order denying motions to vacate the judgment and for a new trial.

It appears from the record herein that the appellant, Marie K. Chirgwin, and the

respondent, Frederick H. Chirgwin, intermarried on June 30, 1929, in the city of New York and were there living on December 11, 1933, when appellant commenced an action against respondent for separate maintenance on the ground of extreme cruelty, abandonment and failure to provide. The respondent was personally served with process in said action in New York on December 11, 1933. He failed to answer or appear therein, and left New York the next day, i. e., December 12, 1933. He became a resident of the state of Nevada sometime prior to December 25, 1933, and on February 5, 1934 filed in the state of Nevada an action for divorce against appellant on the ground of extreme cruelty. Constructive service only was had upon appellant in the Nevada divorce action, she failed to answer or appear therein, and on March 13, 1934, a decree of divorce was entered in the state of Nevada in favor of respondent, which judgment actually became final on the same day. After due proceedings in the separate maintenance action in New York a decree of judicial separation was entered on April 16, 1934, which awarded to appellant the sum of \$30 per week for her support and maintenance and her costs of action. At no time did either defendant in the New York action or in the Nevada action make any attempt to have the respective judgments modified or set aside.

The instant action was prosecuted in California in the name of an assignee of appellant, to recover sums which she alleged had accrued under the New York judgment, but during the course of this proceeding Marie K. Chirgwin was substituted as party plaintiff, pursuant to a reassignment and an order of the court. Appellant, said Marie K. Chirgwin, is still a resident of the state of New York, and the respondent is now a resident of the State of California.

In defense of this California action, respondent pleaded the Nevada divorce decree as evidence of the prior termination of the marital relation and therefore an absolute bar to the right of the New York court to subsequently make any award in appellant's favor in the separate maintenance action.

At the trial appellant rested her case entirely upon the New York judgment and a written stipulation of facts filed herein; the trial court rendered its judgment in favor of respondent, and upon this appeal

appellant contends that the said judgment is erroneous because (1) the trial court failed to give full faith and credit to the New York judgment; and (2) the Nevada decree is immaterial in that it is evidence only in a proceeding affecting the marital relation between the parties, and the action at bar is not such a proceeding.

Respondent urges that the Nevada decree of divorce absolutely terminated the marital status of the parties hereto and that the New York judgment in the separate maintenance action is unenforceable because of such prior termination of the marital status.

[1, 2] The right to separate maintenance without applying for a divorce "rests on the fact that the relation of husband and wife exists and a decree awarding such maintenance contemplates the existence of the marital relation not only when the decree is made but also during its life. It would seem to follow therefore, that if the wife or husband should thereafter bring an action for divorce, the decree in that action would be conclusive of the rights of the parties, and if it contained no provision for support, it would necessarily terminate the allowance therefor made in the action for separate maintenance." 1 Cal.Jur. 1038, citing *Simpson v. Simpson*, 21 Cal.App. 150, 131 P. 99; *Cardinale v. Cardinale*, 8 Cal.2d 762, 68 P.2d 351.

In the case of *In re Ferry's Estate*, 1935, 155 Misc. 198, 279 N.Y.S. 919, 921, it is stated:

"Under the full faith and credit clause of the Federal Constitution (Const. U.S. art. 4, § 1), a state is not compelled to recognize a divorce granted in another state without obtaining jurisdiction of the defendant, but in accordance with its own public policy may recognize such a divorce. *Haddock v. Haddock*, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1.

"The adjudged policy of this state has been to refuse to recognize as binding a decree of divorce obtained in a court of a sister state, not the matrimonial domicile, upon grounds insufficient for that purpose in this state, when the divorced defendant resided in this state and was not personally served with process and did not appear in the action. (*Hubbard v. Hubbard*, 228 N. Y. 81, at pages 84, 85, 126 N.E. 508, 509, reciting *Olmsted v. Olmsted*, 190 N.Y. 458, 83 N.E. 569, 123 Am.St.Rep. 585, affirmed 216 U.S. 386, 30 S.Ct. 292, 54 L.Ed. 530, 25 L.R.A.,N.S., 1292; *Winston v. Winston*,

165 N.Y. 553, 59 N.E. 273), and the reason for the stated policy of this state is its statutory adoption of the rule that there may be of right but one sufficient cause, to wit, adultery, for absolute divorce.

"A judgment of a sister state cannot push its effect into another state to the subversion of its laws and defeat of its policy (*People v. Baker*, 76 N.Y. 78, 88, 32 Am. Rep. 274), and also 'public policy will not permit us to give effect, as against our own citizens, of a judgment affecting their marital status, so obtained on grounds thought by us to be insufficient' (*Ball v. Cross*, 231 N.Y. 329, 331, 132 N.E. 106, 107, 39 A.L.R. 600)." See, also, *Johnson v. Johnson*, 1933, 146 Misc. 93, 261 N.Y.S. 523.

[3] However, it is settled beyond dispute that a court of one state may, "upon principles of comity, recognize and give effect as a dissolution of the marriage relation to a divorce granted in another state although not the matrimonial domicile, to one who had a bona fide domicile in that state, upon constructive or substituted service of process, notwithstanding that such divorce is not within the protection of the full faith and credit provision. *Haddock v. Haddock*, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1; *DeBouchel v. Candler*, D. C., 296 F. 482; *Hubbard v. Hubbard*, 228 N.Y. 81, 126 N.E. 508; *Ball v. Cross*, 231 N.Y. 329, 132 N.E. 106, 39 A.L.R. 600; *In re Baker's Estate*, 112 Misc. 295, 183 N.Y.S. 139." 39 A.L.R. 616.

It was stated in the case of *DeBouchel v. Candler*, supra, 296 F. 482, 485, referring to the full faith and credit provision of the Constitution:

"* * * nor is the provision applicable at all save to judgments rendered with jurisdiction, which is the power to adjudge, and jurisdiction may be collaterally inquired into. A fundamental principle to be regarded in determining jurisdiction is, that judgments affecting purely personal rights must be founded on service within the territorial jurisdiction of the court on the party to be affected, but that judgments in rem—that is, affecting a particular thing—may be rendered by a court having possession and just control of the thing, though the persons interested in it are absent from the territorial jurisdiction and can be notified only by service other than personal. A divorce, in some of its incidents, such as alimony, is in personam, but in its fixation of matrimonial status it is substantially in rem. Having regard to all these principles, the

following propositions are believed to be established, and, if recognized and observed, will make a fair certainty as to the validity of a divorce decree in states other than that where it is made: * * *

"5. If either spouse removes to another state *animo manendi*, and acquires there a domicile, a jurisdiction arises in such state, based on its interest in, and right to fix, the matrimonial status of its new inhabitant, in virtue of which it may decree such status. After such length of residence as it may fix, and for such causes as it may allow, a divorce may be granted effective within such state; but, if made on substituted service, and perhaps when on personal service if in evasion of the laws of another state, it is not entitled to full faith and credit in other states, but will by comity be recognized, if not detrimental to their policy or interests. * * *

"7. The actual domicile of one party or the other in the state in which a decree of divorce is granted being thus essential to the jurisdiction to make it, whether such domicile in fact exists may be collaterally inquired into when the decree is sought to be used in another state. If it clearly appears that such domicile was lacking, the decree will be treated as a nullity, and the status of the parties unaffected thereby.

"8. The finding of the fact of domicile by the court making the decree raises a presumption that it existed. After a lapse of time, and especially after the rights of other persons have intervened on the faith of the decree, the clearest and most satisfactory proof should be required to overcome the presumption."

In the instant action the court found that the respondent "was a bona fide resident of and was in good faith domiciled in said state of Nevada and in the county of Washoe therein continuously for and during a period next prior to the commencement of said last mentioned divorce action, longer than the period as to which residence within said state was necessary and required to give said last mentioned court jurisdiction of said divorce action. * * *" It was also found that appellant and respondent "separated prior to the commencement of said divorce action and lived separate and apart thereafter; that said Marie K. Chirgwin's treatment of and conduct toward said Frederick H. Chirgwin, in part as hereinafter found, was such as that he was thereby and at all times during the period of their

separation and prior to the rendition of said decree of divorce justified in living separate and apart from her (and he did so on such account) and in acquiring as aforesaid a separate residence and domicile within the state of Nevada and in taking, and that he did take to such separate residence and domicile within said state of Nevada the marital status and res resulting from his marriage with said Marie K. Chirgwin; and that said Marie K. Chirgwin by such conduct on her part consented to have said marital status and res and her interest therein and right to the continuance thereof passed upon, determined and adjudicated by said court of the state of Nevada. * * * and that said Marie K. Chirgwin was and is bound by said decree. * * *

"That said purported New York decree is invalid and unenforceable as against defendant and that said supreme court of the state of New York did not at the time of the rendition of said decree have jurisdiction to render the same."

[4] This appeal is presented to this court upon a bill of exceptions and only a portion of the evidence adduced at the trial is shown therein. Therefore, this court is bound by the findings of fact made by the trial judge in so far as they are consistent with the written stipulation of facts and such fragmentary evidence as is contained in said bill of exceptions.

[5] As hereinbefore shown, this action on the New York judgment was brought in the state of California, and the trial court found that said New York judgment was invalid and unenforceable. In said action appellant asserted the validity of the New York judgment, but made no attack on the Nevada decree except as to its legal effect as shown upon its face. This court, therefore, is not concerned with the status of either the New York judgment or the Nevada decree of divorce in the states of Nevada or New York. There is nothing in the record which would prevent the trial court from making any of the findings which were made, and the trial court having found that respondent was justified in acquiring and that he did so acquire a residence and domicile in the state of Nevada, it is apparent that the requirements have been met which would entitle the Nevada decree of divorce to recognition by the courts of California.

Although personal service was obtained in the New York action and constructive

service only was had in the Nevada action, taking into consideration all of the facts and circumstances as well as the absence of an attack upon the Nevada decree by appellant for fraud, the courts of this state are bound to recognize the termination of the marital status prior to the rendition of the judgment in the New York action, which judgment could only be rendered in favor of the wife against her husband, while he was still her husband.

Since it was found by the trial court that the marital status of the parties was terminated by the Nevada decree of divorce prior to the rendition of the New York judgment and that the New York court was therefore without jurisdiction to render its judgment in the separate maintenance action, the judgment appealed from should be, and it is, affirmed. The order denying the motion to vacate the judgment is also affirmed, and the appeal from the order denying motion for a new trial is dismissed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 491

BICKNELL et ux. v. STRAWN.

Civ. 1895.

District Court of Appeal, Fourth District,
California.

May 21, 1938.

Hearing Denied by Supreme Court
July 19, 1938.

1. Trial Ⓒ397(6)

In action for rent, where court found that landlord retained possession of premises for his own use at all times after November 5, and found that landlord's possession was for his own use after the month ending on December 4, there was an implied finding that landlord's possession was not for his use and benefit during the month ending on December 4.

2. Appeal and error Ⓒ707(2)

In action for rent, where landlord alleged execution of lease, that tenant abandoned premises and paid no rent after November 5, that landlord took possession for tenant, tenant alleged surrender of premises on November 5, and acceptance thereof

by landlord, and tenant appealed on a bill of exceptions containing only the judgment roll, tenant could not complain of judgment awarding landlord rent for month beginning November 5, as against contention that tenant's check for rent due for preceding month stated "for rent from October 6, to November 6" and that court should have found accordingly.

3. Appeal and error $\S$ 704(2)

Where appeal was presented on a bill of exceptions which contained only the judgment roll so that evidence was not before the Court of Appeal, a finding which was sought by appellant and which was not responsive to any issue raised by the pleadings could not be controlling.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by J. W. Bicknell and his wife against W. C. Strawn to recover an unpaid balance of rent under a written lease. Judgment for plaintiff for \$125 and, from an order denying defendant's motion to set aside the judgment, defendant appeals.

Affirmed.

Karl F. Kennedy, of Coalinga, for appellant.

Chester O. Hansen, of Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiffs brought this action to recover an unpaid balance of rent claimed to be due under a written lease. The complaint alleged that the defendant leased certain real property from the plaintiffs under a written agreement dated July 5, 1931, for a term of two years commencing on that date and ending on July 4, 1933, for a rental of \$3,000 payable at the rate of \$125 on the 5th day of each month. It is then alleged that the rental which became due on November 5, 1931, was not paid; that on or about that date the defendant repudiated the lease and abandoned the premises; that the plaintiffs took possession for and on account of the defendant and endeavored to rent the same but were unable to do so; and that the plaintiffs operated the premises for and on account of the defendant from January 5, 1931, to July 4, 1933. The prayer is for \$2,500. The answer admits the execution of the lease but as a defense alleges that the defendant surrendered the premises to the plaintiffs

on November 5, 1931, that the plaintiffs accepted the same, and that on that date the lease was cancelled by mutual consent.

Among other things, the court found that on November 5, 1931, the defendant surrendered the premises and the plaintiffs took and resumed possession thereof and retained such possession for the entire remaining period of the lease for their own use and benefit, except for the month ending December 4, 1931. As a conclusion of law, the court found that the plaintiffs were entitled to a judgment against the defendant for \$125 for rental of said premises for the month commencing November 5, 1931. Judgment was entered accordingly and the defendant moved for an order setting aside the judgment and substituting a judgment in his favor on the ground that the conclusion of law was inconsistent with, and not supported by, the findings of fact. This motion was denied and the defendant has appealed from the order denying that motion.

The appeal is presented on a bill of exceptions which contains only the judgment roll, and the evidence is not before us. The appellant relies upon another finding to the effect that on August 6, 1931, he paid the rent of \$125 by a check upon which appears the notation "Rent for Oil Center Rooms for August 6 to September 6", that on September 6, 1931, he paid another \$125 by check containing a similar notation, that on October 6, 1931, he paid another \$125 by a check containing the notation "Rent for Oil Center Rooms Oct. 6, 1931 to Nov. 6, 1931", and that each of these checks was accepted by the respondents without objection. It is argued that this finding shows that nothing was due until the morning of November 6, 1931, that the court also found that the respondents had possession of the premises for their own use and benefit from and after November 5, 1931, and that it follows that the conclusion that a month's rent was due is inconsistent with, and not supported by, the findings.

[1-3] Appellant is in error in saying that the court found that the respondents retained possession of the premises for their own use and benefit at all times after November 5, 1931. While the court found that they took possession on that date it also found, in response to the issue raised by the pleadings, that their possession was for their own use and benefit after the month ending on December 4, 1931. There is an implied finding that it was not for

their use and benefit during that month. The issue now suggested by the appellant, as to whether the rental had in fact been paid up to midnight of November 5, 1931, in spite of the terms of the written lease, was not raised in the pleadings, which is all we have before us, and under the plain admission of the answer filed by appellant one month's rental was due and payable to the respondents. In any event, the finding relied upon by the appellant would make a difference of only one day's rent. However, it was not responsive to any issue raised by the pleadings and cannot be controlling here, where no other record is before us.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



26 Cal.App.2d 459

LE CYR v. DOW.

Civ. 2158.

District Court of Appeal, Fourth District,
California.

May 19, 1938.

1. Appeal and error ⇨343

The filing of cost bill by court clerk at defendant's instance did not extend time for filing appeal from judgment for defendant. Code Civ.Proc. § 939.

2. Appeal and error ⇨343

Plaintiff was not entitled to extension of time to appeal from judgment for defendant after filing of cost bill at defendant's instance on ground that he had no other remedy than appeal in respect to part of judgment representing costs, as he could have filed motion to strike such bill or to re-tax costs, if defendant failed to comply with statute in filing memorandum of costs, and had adverse order on such motion reviewed or appealed therefrom after final judgment. Code Civ.Proc. §§ 939, 963.

3. Appeal and error ⇨356

The District Court of Appeal is without jurisdiction to consider appeal filed after expiration of statutory time therefor. Code Civ.Proc. § 939.

Appeal from Superior Court, Inyo County; H. Z. Austin, Judge.

Action by J. R. Le Cyr against G. W. Dow. Judgment for defendant, and plaintiff appeals. On respondent's motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Fred W. Heath, of Los Angeles, for appellant.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal upon the ground that it was not taken within the time permitted by section 939 of the Code of Civil Procedure and that this court is, therefore, without jurisdiction to entertain said appeal. It appears without conflict that the judgment from which the appeal was taken was entered on June 11, 1937, that notice of a motion for a new trial was filed on July 9, 1937, that this motion was denied on September 1, 1937, and that notice of appeal was filed for the first time on November 3, 1937.

In opposition to the motion to dismiss, the appellant submits an affidavit setting forth that no memorandum of costs was filed in said action until on or about November 1, 1937, and that the last entry in the Register of Actions in the clerk's office pertaining to said case is as follows: "Approx. Nov. 1, 1937, Memorandum of Costs filed". It is then alleged on information and belief that on or about November 1, 1937, counsel for the respondent caused the clerk of the superior court to extract from the file of another action a memorandum of costs which had theretofore been filed therein and to file the same in the files of this action.

[1, 2] It seems to be appellant's contention that the filing of this cost bill on or about November 1, 1937, in some way extended the time for filing an appeal from the judgment. Just how this result could obtain in the face of the plaintiff provision of the statute setting forth the time within which an appeal may be taken is not explained. The appellant argues, however, that unless the time within which an appeal may be taken is extended under such circumstances he is deprived of his right of appeal from that part of the judgment representing the costs. The time within which an appeal may be taken is fixed by statute

and no such exception as that contended for by the appellant is provided for therein. Neither is it true that the appellant had no remedy. If the respondent failed to comply with the statute in filing his memorandum of costs the appellant could have filed a motion to strike the cost bill or a motion to retax the costs, and if he was dissatisfied with the ruling made by the court upon such a motion he was entitled to have the order reviewed, as provided for by section 963 of the Code of Civil Procedure. *Markart v. Zeimer*, 74 Cal.App. 152, 239 P. 856. The rights of appellant could have been sufficiently protected through one of the motions referred to or through an appeal from an adverse order thereon made after final judgment.

[3] Under the plain provisions of the statute the time for appeal expired more than thirty days before this attempted appeal was filed, and we are without jurisdiction to consider the same.

The motion is granted and the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.



26 Cal.App.2d 452

**HELPING HAND HOME FOR CHILDREN
v. SAN DIEGO COUNTY et al.**

Civ. 2036.

District Court of Appeal, Fourth District,
California.

May 19, 1938.

1. Taxation ⇨241(2)

An orphanage seeking cancellation of tax assessments under constitutional provision exempting from taxation the property of institutions sheltering more than 20 orphan children receiving state aid had burden of showing why the ordinary construction that the phrase "receiving state aid" applied to the nearest antecedent noun "children," and not to the noun "institutions," should not be adopted. Const. art. 13, § 1½a.

2. Constitutional law ⇨13

Statutes ⇨181(1)

The effort of the courts in construing statutes and constitutional provisions is di-

rected to ascertaining the true intent of the statutes from the language used.

3. Constitutional law ⇨13

Statutes ⇨189

Where language of statute or constitutional provision is so fantastic in its necessary consequences, if literally applied, that it is impossible to give to statute or provision any rational meaning, and where a mere reading of statute or provision will convince any rational mind that what is actually stated could not have been meant, the courts will reconstruct the language used in order that the apparent intent of the statute or provision will not fail for want of accurate expression.

4. Constitutional law ⇨16

Statutes ⇨215, 216

Where language of statute or constitutional provision is so ambiguous that it is impossible to tell without extrinsic aid which of two or more meanings, equally admissible on the face of the statute or provision, ought to be assigned to statute or provision, courts can resort to record of debates in legislative body or constitutional conventions or to arguments made to electors in submission of propositions for adoption in order to ascertain which of the alternative and admissible meanings should be ascribed to the language used.

5. Statutes ⇨181(2)

When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former construction should be rejected and the latter construction adopted.

6. Constitutional law ⇨14

Statutes ⇨190

A statutory or constitutional provision involving no ambiguity or absurdity requires no interpretation.

7. Constitutional law ⇨16

In construing constitutional provision, resort to debates and constitutional conventions or to arguments made to voters are to be had only with caution, and not at all where the meaning of the provision involved is clear.

8. Taxation ⇨241(2)

The words "receiving state aid," in constitutional provision exempting from taxation the property of institutions sheltering more than 20 orphan children receiving state

aid, modified the noun "children" and not the noun "institutions," and hence an orphanage was exempt from taxation only during the years that 20 orphan children at orphanage had received state aid, notwithstanding that statute and another provision of Constitution appropriated state-aid money to the orphanage and not to the orphans, where the aid was given for each orphan. Pol.Code, § 2283; Const. art. 4, § 22; art. 13, § 1½a.

[Ed. Note.—For other definitions of "State Aid," see Words & Phrases.]

9. Charities ⇐41

A constitutional provision that state aid to institutions conducted for the support of orphans should "be proportioned to the number of inmates of such respective institutions" meant that a given proportion of the aid should be given for each inmate. Const. art. 4, § 22.

10. Taxation ⇐241(2)

The meaning of the words "receiving state aid," in constitutional provision exempting from taxation the property of institutions sheltering 20 orphan children receiving state aid, if ambiguous, could not be affected by statutes referring to the process by which state aid was rendered for the support of orphans. Pol.Code, § 2283; Const. art. 13, § 1½a.

11. Taxation ⇐241(2)

A construction that constitutional provision, exempting from taxation the property of institutions sheltering more than 20 orphan children receiving state aid, meant that only orphanages containing more than 20 orphan children receiving state aid were exempt from taxation, would not give rise to absurd consequences so as to permit application of rule that a constitutional provision should be so construed as to give a sensible and intelligible meaning to every part of it so as to avoid absurd and unjust consequences. Const. art. 13, § 1½a.

12. Taxation ⇐204(2)

The constitutional provisions for exemption from taxation must be strictly construed. Const. art. 13, § 1.

poration, against the County of San Diego, a political subdivision of the State of California, and others, for the cancellation of assessments of taxes. From the judgment, the petitioner appeals.

Affirmed.

Ferdinand T. Fletcher and James G. Pfanstiel, both of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and William A. Glen, Chief Deputy Dist. Atty., both of San Diego, for respondents.

HAINES, Justice pro tem.

Appellant, Helping Hand Home for Children, hereinafter referred to as the "Home", is a nonprofit charitable corporation organized under the laws of California and owns certain real property within the city of San Diego, on which are certain buildings wherein it conducts its activities, which consist generally of sheltering and caring for needy children. Its properties were assessed for the purposes of taxation and taxes levied thereon by the authorities of the county of San Diego for each of the fiscal years 1932-3, 1933-4, 1934-5 and 1935-6. Appellant instituted the present proceeding by petition for a writ of mandate against the County of San Diego and the Board of Supervisors and District Attorney thereof, wherein it is claimed that each and all of these assessments and tax levies are illegal "for the reason that all said buildings and the whole of said real property, during each and every fiscal year, were required and used by petitioner for its occupation as an institution sheltering more than 20 orphan children receiving state aid, and because of said use and occupation is free from taxation". It is further alleged that the purported taxes so levied have not been paid and are, according to the records, delinquent, and that the records of such purported delinquencies constitute and are clouds upon the petitioner's title; that application to the Board of Supervisors for their removal has been made and denied. It is further alleged that appellant Home "has performed each and every act and thing by it to be performed to render said property exempt from taxation". The court was asked to direct the Board to cause the record of said tax assessments and levies to be canceled and to direct the District Attorney to assent to such cancellation.

The answer as amended, admitted most of the matters alleged in the petition but denied appellant's status as an institution sheltering more than 20 orphan and half-

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Mandamus proceeding by the Helping Hand Home for Children, a nonprofit cor-

orphan children receiving state aid, and denied the performance by appellant of the conditions precedent to its right to exemption from taxation. The case having been tried, the court found that appellant was a nonprofit charitable corporation, as alleged, owning the property described in its petition, and that assessments and levies of taxes had been made against the same as claimed, and remained unpaid; that during each of the fiscal years 1934-35 and 1935-6 appellant Home "actually sheltered and had in its care and custody in said buildings and upon said real property more than 20 orphan and half-orphan children for whom petitioner received state aid", but that during the respective fiscal years 1932-3 and 1933-4, though in the one year it sheltered and cared for 33, and in the other for 41 orphan and half-orphan children, it had received state aid for only 15 of them in the former year and for only 17 in the latter. The court's conclusion of law was that appellant's property should have been given exemption from taxation for the fiscal years 1934-5 and 1935-6, but not for either of the fiscal years 1932-3 or 1933-4, and judgment was given accordingly. From this judgment appellant Home appeals.

The sole question before us for consideration is the proper construction of that part of section 1½a of article 13 of the State Constitution which, in so far as we need quote it, reads as follows:

"Exempting orphanages from taxation. All buildings, and so much of the real property connected therewith as may be required for the occupation of institutions sheltering more than twenty orphan or half-orphan children receiving state aid shall be free from taxation * * *."

The present inquiry is stated in appellant's opening brief to be: "Does the phrase 'receiving state aid' refer to and limit the noun 'institutions' or the noun 'children'?" It is manifest that if the expression "receiving state aid" applies to the noun "institutions" then for the two fiscal years 1932-3 and 1933-4 affected by the appeal, appellant Home was entitled to exemption from taxation because each of said years it received some aid for some children, whereas, if the said expression "receiving state aid", as used in the constitutional provision, refers to and limits the noun "children" then, since the state aid was not, during either of said two years given to appellant Home for as many as 20 children, it is not for either year exempt from taxation.

[1] If the ordinary rules of grammar were followed, the phrase "receiving state aid" would be treated as applying to the nearest antecedent noun which is "children", not "institutions". Obviously, therefore, it is the burden of appellant Home to show why that construction should not be adopted. Starting out with the propositions that the cardinal rule in construing a constitutional or statutory provision is to ascertain its intent (In re Davis, 18 Cal.App.2d 291, 63 P.2d 853; People v. Strickler, 25 Cal.App. 60, 142 P. 1121); that the interpretation adopted must be reasonable (Civ.Code, sec. 3542); that a constitutional provision or a statute should be so construed as to give a sensible and intelligible meaning to every part of it so as to avoid absurd and unjust consequences (Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; Madary v. City of Fresno, 20 Cal.App. 91, 97, 128 P. 340; Ex parte Zany, 20 Cal.App. 360, 368, 129 P. 295; In re Davis, supra); and that a statute should be so interpreted as to make it valid and effective (In re Davis, supra); appellant's counsel urge: (a) that the arguments presented under the provisions of section 1195 of the Political Code and submitted with their sample ballots to the electors when section 1½a of article 13 of the Constitution was submitted in 1920 for adoption assume, and, in effect, say, that the reference is to institutions that are, as such, receiving state aid, and that resort may properly be had to these arguments in determining the proper construction of the amendment as adopted; (b) that under article 4, section 22 of the state Constitution and sections 2283 to 2289, both inclusive, of the Political Code, as in effect at the time of the assessments and tax levies here involved (in 1937 carried in a revised form into the Welfare and Institutions Code, St.1937, p. 1005 et seq.), orphan aid was given not to the child but to the institution and, therefore, that in the said constitutional provision the words "receiving state aid" necessarily refer to the institution, not children; and (c) that the construction for which respondents contend would lead to results to such an extent absurd and unjust that the electors cannot reasonably be believed to have contemplated them.

On behalf of respondents, on the other hand, it is urged that the said section 1½a of article 13 of the Constitution is free from ambiguity and therefore requires no construction; that it follows

that the courts may not go outside its language to ascertain its meaning and, finally, that exemption from taxation is the exception and not the rule and, therefore, that the exemption provision under discussion must be strictly construed.

[2-5] We are constrained to the view that respondents' contention must be upheld. While it is true that the effort of the courts, alike in construing statutes and in construing constitutional provisions, must be directed to ascertaining their true intent, yet such intent is ordinarily to be ascertained from their language. Sometimes, indeed, their language may be so fantastic in its necessary consequences, if literally applied, that it is impossible to give to it any rational meaning, and that a mere reading of it is enough to convince any rational mind that what it actually stated could not have been meant; and on the other hand, language used is sometimes so ambiguous that, without extrinsic aid, it is impossible to tell which of two or more meanings, equally admissible on its face, ought to be assigned to it. When confronted with the former of these situations the courts have gone to considerable lengths to reconstruct the language used in order that the apparent intent of the provision or enactment should not fail for want of accurate expression (*People v. Strickler*, supra, page 66, 142 P. 1121; *In re Davis*, supra); and when confronted with the latter situation, particularly in the case of constitutional provisions, the courts may properly resort to the record of debates in legislative bodies or constitutional conventions or to the arguments made to the electors in the submission of propositions for adoption, in order to ascertain which of the alternatives and admissible meanings should be ascribed to the language used (*Story v. Richardson*, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; *Yosemite Lumber Co. v. Industrial Acc. Comm.*, 187 Cal. 774, 204 P. 226, 20 A.L.R. 994; *Pasadena University v. Los Angeles County*, 190 Cal. 786, 214 P. 868). It is also the law, as laid down, for example, in *Robbiano v. Bovet*, supra, page 596, 24 P.2d page 470, quoting from *People v. Ventura Ref. Co.*, 204 Cal. 286, 292, 268 P. 347, 283 P. 60, that:

"When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted."

CAL.REP.79-80 P.2d-17

[6,7] In *People v. Ventura Ref. Co.*, supra, indeed, the court went so far (page 290, 268 P. page 349) as to say that "where the interpretation claimed leads to injustice, oppression, or to absurd consequences, the general terms used in a statute will be limited in their scope so as to avoid such a result". Citing *Ex parte Lorenzen*, 128 Cal. 431, 438, 439, 61 P. 68, 50 L.R.A. 55, 79 Am.St.Rep. 47, and *People v. Earl*, 19 Cal.App. 69, 71, 72, 124 P. 887. We do not see anything, however, in the instant case that could justify us in the application of any of these principles. Nothing is more firmly settled than in ordinary circumstances, where it involves no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation. *Bourland v. Hildreth*, 26 Cal. 161, 180; *City of Eureka v. Diaz*, 89 Cal. 467, 469, 26 P. 961; *Davis v. Hart*, 123 Cal. 384, 387, 55 P. 1060; *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 5 P.2d 882; *Earl Ranch, Ltd., v. Industrial Acc. Comm.*, 4 Cal.2d 767, 769, 53 P.2d 154; *In re Weisberg*, 215 Cal. 624, 632, 12 P.2d 446; *Rumetsch v. Davie*, 47 Cal.App. 512, 515, 190 P. 1075; *Dodge v. Mitchell*, 94 Cal.App. 779, 781, 272 P. 352. Resort to debates in constitutional conventions or to arguments made to voters are to be had only with caution and not at all where the meaning of the provision involved is clear. *People v. McCreery*, 34 Cal. 432, 453; *In re Smith*, 152 Cal. 566, 93 P. 191; *Fay v. District Court of Appeal*, 200 Cal. 522, 536, 254 P. 896; *McGuire v. Wentworth*, 120 Cal.App. 340, 344, 7 P.2d 729.

[8-10] We find no ambiguity in the constitutional provision here involved. The words "receiving state aid" in the position in which they appear, clearly apply to and modify the noun "children". The suggestion that to so apply them would be out of harmony with the method of giving state aid actually in force, contemplated in section 22 of article 4 of the Constitution and made effectual by said former section 2283 of the Political Code is unsound. It is true enough that the appropriation of moneys was made to the institution, but so far as section 22 of article 4 of the Constitution is concerned, while it authorizes the granting of state aid to institutions conducted for the support and maintenance of minor orphans, half-orphans, etc., it goes on to require that the aid "be proportioned to the number of inmates of such respective institutions", which is tantamount to saying that a given

PEOPLE v. GOURDIN.

Cr. 3093.

District Court of Appeal, Second District,
Division 1, California.

May 23, 1938.

Hearing Denied by Supreme Court
June 20, 1938.

proportion of the aid shall be given for or, in effect, to each inmate. As respects the Political Code, under the terms of the former section 2283 the aid was given to the institution "for each such orphan, half-orphan", etc., "supported and maintained in such institution or by such county, city and county, city, or town". While the aid was given to the institution, it was for the support of the inmate, which is for practical purposes merely a method of aiding the inmate. The reference, then, in section 1½ of article 13 of the Constitution to "children receiving state aid" is to all intents and purposes accurate. Even, however, if this constitutional provision did not, though in fact it does, refer with substantial accuracy to the process by which state aid is rendered for the support of orphans, its meaning could hardly be affected by the provisions from time to time made in that behalf by mere statutes. Section 2283 of the Political Code was originally enacted in 1907, though it was several times amended and finally superseded in 1937, as already noted, by the cognate provisions of the Welfare and Institutions Code. Section 1½ of article 13 of the Constitution was adopted, as hereinbefore noted, in 1920.

[11] We may add that there does not seem to us to be any intrinsic absurdity in requiring, as a requisite to the exemption of what may be valuable properties from taxation, that the institution owning them be one with which the state is sufficiently concerned to be aiding a substantial number of its inmates. Otherwise, the mere fact that such institution might be in receipt of an insignificant amount of aid for the support of a single child might exempt it from paying taxes on many thousands of dollars' worth of property.

[12] Finally, even though we thought some ambiguity to exist in the constitutional language discussed, as we in fact do not, we would still be required to follow the stricter construction since provisions for exemption from taxation must be strictly construed. State Constitution, art. 13, sec. 1; State Land Settlement Board v. Henderson, 197 Cal. 470, 481, 241 P. 560; Cypress Lawn Cemetery Association v. City and County of San Francisco, 211 Cal. 387, 390, 295 P. 813.

The judgment is affirmed.

We concur: BARNARD, P. J.;
MARKS, J.

1. Criminal law §1134(9)

On appeal from order denying petition for writ of error coram nobis, an appeal from judgment rendered on or about a stated date was considered as abandoned where appeal from judgment was not urged in briefs, no oral notice of appeal was given, written notice of appeal from judgment was not filed within time required by statute, order for reporter's transcript was for preparation of report of proceedings had on later date, and record contained recital only of proceedings had in connection with petition. Pen.Code, § 1239.

2. Criminal law §997

Defendant who pleaded guilty to charge of statutory rape was not entitled to writ of error coram nobis on ground that plea was obtained under a misapprehension of facts because no showing was made that witness testifying concerning complainant's age and person named by complainant as her mother at preliminary hearing were one and the same person, where complainant testified that she was under the age of 18 years and that name mentioned was her mother's maiden name.

3. Criminal law §421(3)

In prosecution for statutory rape, the prosecuting witness was competent to testify concerning her own age.

4. Criminal law §997

Defendant who pleaded guilty to charge of statutory rape was not entitled to a writ of error coram nobis and withdrawal of plea in absence of strong and convincing proof that complaining witness was more than 18 years old at time of commission of offense.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George Manuel Gourdin was convicted of statutory rape on a plea of guilty, and he appeals from an order denying his petition for writ of error coram nobis.

Affirmed.

Selma K. Ellner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

[1] In the notice of appeal filed herein on March 7, 1938, appellant, in addition to the appeal from the order denying the petition for writ of error coram nobis, also appeals "from the judgment rendered in this cause on or about the 10th day of Feb., 1938". However, the appeal from such judgment is not urged in the briefs now before us, and it has apparently been abandoned by appellant. No oral notice of appeal was given and the written notice of appeal from the judgment was not filed within the time required by section 1239 of the Penal Code. Furthermore, the order for reporter's transcript is for the preparation of a report of the proceedings had on March 4, 1938, therefore the record before us contains a recital only of the proceedings had in connection with the petition for the writ of error coram nobis.

Appellant was charged in an information containing two counts with the crime of statutory rape and forcible rape, and also two prior convictions.

Upon the day set for trial, appellant withdrew his plea of "not guilty" and entered a plea of "guilty" to the charge of statutory rape and admitted the two prior convictions. On February 8, 1938, sentence was imposed upon appellant for the crime of statutory rape, as charged in count I of the information, and at the same time count II (forcible rape) was dismissed. Thereafter, on February 28, 1938, appellant filed his petition for writ of error coram nobis, supported only by the affidavit of his attorney of record, who had been substituted as such attorney of record after the pronouncement of sentence. Said affidavit recited that said attorney had discovered new evidence. Upon hearing, the petition for the writ was denied.

[2, 3] Appellant here contends that his plea of "guilty" to the charge of statutory rape was obtained from him under a misapprehension of the facts; that the complainant testified at the preliminary hearing that her mother's name was "Mrs. Groh", and that therefore the witness, who testified she was the mother of the complainant, was not qualified to testify

as to the age of said complainant, because no showing was made that said witness and Mrs. Groh were one and the same person. However, the record shows that said complainant testified at the preliminary hearing that she was under the age of eighteen years, and she also testified that her mother's maiden name was Groh. The prosecuting witness was competent to testify as to her own age. *People v. Ellis*, 206 Cal. 353, 359, 274 P. 353; *People v. Ratz*, 115 Cal. 132, 133, 46 P. 915.

[4] In order to justify the issuance of the writ of error coram nobis and permit a withdrawal of the plea of "guilty", it would require strong and convincing proof on the part of appellant that the complaining witness was over the age of eighteen years at the time of the commission of the crime. *People v. Schwarz*, 201 Cal. 309, 314, 257 P. 71. This requirement has not been met by appellant; he has given voice to his mere suspicion only, and has not stated any matter of fact to sustain his petition.

The order appealed from is, therefore, affirmed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 471
GERBERICH et al. v. SOUTHERN CALIFORNIA EDISON CO., Limited, and
three other cases.

Civ. 11407.

District Court of Appeal, Second District,
Division 1, California.

May 20, 1938.

Rehearing Denied June 13, 1938.

Hearing Denied by Supreme Court
July 18, 1938.

1. Negligence ⇨125

Evidence of previous accidents similar in their general character to the accident in question is admissible to show dangerous character of place where accident occurred.

2. Electricity ⇨19(4)

In action for damages sustained when automobile collided with defendant's power pole, whether previous accidents at the same place were different in their general character, so evidence thereof was not admissible

as evidence of dangerous character of pole, rested in trial court's discretion.

3. Appeal and error ⇨1060(1)

A judgment will not be disturbed on appeal on grounds of misconduct unless it appears that such misconduct resulted in a miscarriage of justice.

4. Appeal and error ⇨1060(1)

In action for damages sustained when automobile collided with defendant's power pole, wherein evidence was introduced concerning previous accidents at the same place, plaintiffs' argument that defendant's failure to prove that no other claims or suits had been filed against defendant as a result of previous accidents was an admission that such claims and suits had been filed was not prejudicial.

5. Electricity ⇨16(1)

A power company maintaining a pole in highway was required to exercise ordinary care so that injury would not come to others, notwithstanding that power company's easement to maintain pole was prior in time to dedication of highway.

6. Appeal and error ⇨882(12)

Trial ⇨296(7)

In action for damages sustained when automobile collided with defendant's power pole, wherein defendant alleged that accident was caused by sole negligence of driver, instruction that any one alleging that the accident was caused by the sole negligence of the driver had the burden of proof was not error as placing on defendant the burden as respects an affirmative defense of driver's sole negligence and that such negligence was not pleaded, where elsewhere jury was properly instructed on the burden of proof and defendant apparently acquiesced in the alleged error. St.1931, p. 2120, § 113.

7. Electricity ⇨19(6)

Evidence whether power pole was negligently maintained by defendant power company in the highway was for jury, as respects defendant's liability for damages sustained when automobile collided with pole and occupants thereof were killed or injured.

8. Abatement and revival ⇨58

A father's action for loss of earnings and for medical treatment to a minor daughter injured in automobile accident did not survive at common law or under statutes to

father's administratrix, since the daughter was not "property" within the meaning of that term as used in the statutes. Probate Code §§ 573, 574.

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Actions by George C. Gerberich and others and by Ralph Gish, and by Marguerite Olivera, as special administratrix of the estate of Walter E. Olivera, deceased, and by Marguerita Olivera Van Klaveren, against the Southern California Edison Company, Limited, a corporation, for damages sustained when an automobile collided with a power pole belonging to the defendant. From a judgment in favor of all defendants except Marguerite Olivera, as special administratrix of the estate of Walter E. Olivera, deceased, and from an order denying defendant's motion for judgment notwithstanding verdicts for plaintiffs, the defendant appeals, and from a judgment notwithstanding the verdict in favor of Marguerite Olivera, as special administratrix of the estate of Walter E. Olivera, deceased, Marguerite Olivera, as special administratrix, appeals.

Judgments and order affirmed.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for appellant Southern California Edison Co.

Eckman & Lindstrom, of Los Angeles (Morton L. Barker, of Los Angeles, of counsel), for appellant Marguerite Olivera as special administratrix.

Leonard E. Thomas and Harold A. Jones, both of Los Angeles, for respondents George C. Gerberich et al.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondent Ralph Gish.

Eckman & Lindstrom, of Los Angeles (Morton L. Barker, of Los Angeles, of counsel), for respondent Marguerita Olivera Van Klaveren.

DORAN, Justice.

Before the trial in the lower court, four separate actions growing out of the same accident were consolidated.

The Gerberich action was brought by parents to recover damages for the death of their minor daughter.

The action in which Marguerite Olivera has been substituted as special administratrix in the place of Walter E. Olivera, who died before the case was brought to trial, was brought to recover loss of earnings and for medical treatment to a minor daughter (Marguerita Olivera Van Klaveren), injured in the accident.

The cases in which Ralph Gish and Marguerita Olivera Van Klaveren are plaintiffs, were brought to recover damages for personal injuries sustained in the same accident.

The jury returned a verdict for the respective plaintiffs and a judgment against defendant Southern California Edison Company, Ltd. (hereinafter referred to as "Edison Company" or "defendant"), was entered thereon. Defendant's motion for judgment notwithstanding the verdict was denied as to three of the plaintiffs and was granted as to Marguerite Olivera as special administratrix, on the sole ground of abatement; that is to say, that said action did not survive the death of Walter E. Olivera.

The Southern California Edison Company, Ltd., appeals from the judgment as well as from the order denying said motion for judgment notwithstanding the verdict.

Marguerite Olivera, as special administratrix, appeals from the judgment notwithstanding the verdict in favor of plaintiff.

One of the actions thus merged into the consolidated case, namely, the Gerberich action, had been once tried previous to the order of consolidation, that trial resulted in a judgment for defendant based upon an instructed verdict. This judgment was reversed by the Supreme Court on appeal. *Gerberich v. Southern California Edison Co.*, 5 Cal.2d 46, 53 P.2d 948. Said opinion in the Gerberich Case described the accident out of which these actions resulted, as follows (page 949):

"At about 9:30 o'clock on a Sunday evening in midsummer deceased was riding with a young man in the rumble seat of an automobile driven by one Renne. The party consisted of two couples from seventeen to nineteen years of age, on their way to the beach. They proceeded south on Alameda street to a point opposite the intersection of Gage avenue (which latter street was not cut through on the west side of Alameda where the accident occurred), and there collided with a pole erected and main-

tained by defendant in the dirt portion of the highway, causing injuries which resulted in the death of deceased.

"Alameda street consisted of a concrete pavement 24 feet wide, flanked on each side by a 2-foot strip of macadam and unpaved the balance of the width of the highway, which was a total of 40 feet except for an added 20-foot strip on the west side, starting at a point opposite the north curb of Gage avenue and extending about 120 feet south. The pole was 1.3 feet in diameter and its center was placed 6 feet from the edge of the concrete, or 4 feet from the edge of the macadam shoulder, and slightly north of a point opposite the prolongation of the south curb of Gage avenue. The pole was black, unmarked, and bore no light. It was a 'junction pole,' erected to support wires running north and south on Alameda and east on Gage.

"There was evidence that the dirt portion of the road, including the 20 feet additional width at that point was frequently traversed on both sides of the junction pole when traffic was somewhat congested. The nearest street light was at the next corner. The pole could ordinarily be seen at night by a driver going south, when within 25 to 30 feet of it. North of the pole a few feet was a post painted white and bearing a sign to direct motorists entering Alameda from Gage avenue.

"As Renne's car, going south, approached the intersection of Gage avenue, he swung to the left to pass another south-bound car. As he came abreast of it, a third car entered Alameda from Gage, making a left turn to go south. To avoid hitting this third car, Renne swung back sharply to the right, then to the left, and back to the right, running onto the dirt shoulder on the west side of Alameda and going about 40 feet ahead on the dirt until he hit the pole."

It should be further noted at this point that Renne, the driver of the car, is not a party plaintiff in any of the aforesaid actions, but is named as a party defendant in the action by Ralph Gish.

Appellant Edison Company contends, in substance, that evidence offered by plaintiffs was improperly admitted; that opposing counsel were guilty of misconduct; that defendant's motion for a directed verdict was improperly denied; that instructions were erroneously given and refused; that there is not sufficient evidence of negligence to support the verdict; and that the motion for

judgment notwithstanding the verdict should have been granted.

[1,2] The contention first above mentioned, namely, that evidence offered by plaintiffs was improperly admitted, is based on the trial court's ruling, over the objection of appellant, that certain evidence of previous accidents was relevant. In that connection it has been held: "The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect. * * * It is in effect contended, however, that before previous accidents may be shown it must be made to appear that such previous accidents occurred under circumstances precisely similar to those characterizing the later or subsequent one, and that no such showing was made in this case. We think, though, that the rule is that the previous accidents need only be similar in their general character to the one in question to render proof of them admissible." *Long v. John Breuner Co.*, 36 Cal.App. 630, 640, 172 P. 1132, 1136; see, also, *Magnuson v. City of Stockton*, 116 Cal. App. 532, 535, 3 P.2d 30; *McCormick v. Great Western Power Co.*, 214 Cal. 658, 664, 8 P.2d 145, 81 A.L.R. 678. It is urged by appellant, however, that the previous accidents were different in their general character from the accident out of which the pending litigation arose. Primarily the determination of the question raised by defendant's objection to the introduction of such testimony was addressed to the discretion of the trial judge. From an examination of the evidence in question it does not appear that the aforesaid rulings amounted to an abuse of discretion.

It is further urged by appellant that the injurious effect of such asserted erroneous admission of testimony relative to other collisions was augmented by the argument of plaintiffs' counsel to the jury. It is claimed by appellant that such argument was to the effect that defendant had failed to prove that no claims or suits, other than the ones involved herein, had been filed against defendant as a result of automobiles colliding with this pole, and that by failing so to do, defendant necessarily admitted that claims of this character had been filed and that other actions at law had been brought against the defendant growing out of other automobiles colliding with said pole. In this connection it is further urged that appellant objected to such argument, assigned the same as prejudicial misconduct and then

and there requested the court to instruct the jury on the subject, which request was refused. Respondents, on the other hand, deny that such a request was made.

In support of a motion for a new trial, the foregoing incident was alleged as an irregularity in proceedings of the court and adverse party and, in substance, as a sufficient cause for vacating the verdict. The motion for a new trial was denied by the trial judge.

[3,4] It appears to be well settled that a judgment will not be disturbed on appeal on the grounds of misconduct unless it appears that such misconduct resulted in a miscarriage of justice (*Robinson v. Western States Gas & Elec. Co.*, 184 Cal. 401, 407, 194 P. 39; *Ward v. De Martini*, 108 Cal.App. 745, 751, 292 P. 192; *Gregorie v. Northwestern Pac. R. R. Co.*, 95 Cal.App. 428, 440, 273 P. 76), and in that connection it has been declared that: "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." *Lafargue v. United Railroads*, 183 Cal. 720, 724, 192 P. 538, 540. It does not appear, from an examination of the record, that the argument of plaintiffs' counsel to the jury, about which appellant complains, amounts to that prejudicial misconduct which, under the circumstances herein recited, would justify a reversal.

[5] Appellant's contention, namely, that defendant's motion for a directed verdict was improperly denied, is based on the proposition that the undisputed evidence proved the existence of a vested right in appellant in the nature of an easement to maintain the pole in question as the same was located at the time of the accident, and that such easement was not subject to the highway, but that the highway was subject to the easement. It is argued that such easement being prior in right to the highway, appellant was "under no obligation to remove its pole or light it or otherwise safeguard it from being struck by automobiles."

It is with regard to the foregoing contention of appellant that, as appellant further contends, certain instructions were erroneously given and refused. The court instructed the jury, in part, that irrespec-

tive of whether the location and maintenance of the pole in question was "under easement or under franchise, or a combination of the two, it was the duty of the defendant, Southern California Edison Company, Ltd., to at all times exercise ordinary care in the maintenance of its power line, including the pole in question, to avoid injuring others lawfully using the highway". That, "in the absence of fee ownership of the property, having merely the right to maintain its pole, the pole was lawfully there, but whether or not in the maintaining thereof the defendant should have done anything that the defendant did not do in warning or protecting the public as against the maintenance of said pole is purely a question of fact for you, the court's instruction of law being that the defendant owed the public the duty of using ordinary, reasonable care in regard to the maintenance of the pole, and, of course, reasonable care is always relative to the circumstances, likewise negligence. Negligence is not intrinsic or absolute, but always relates to the circumstances of time, place or persons." Further quoting, "If you find from the evidence and a preponderance thereof that it was reasonably to be anticipated that drivers of automobiles proceeding south on Alameda street at the intersection of Gage avenue and Alameda street at night might strike the pole maintained at this place by the defendant, Southern California Edison Company, then I charge you it was the duty of the Southern California Edison Company to exercise ordinary care to prevent such accidents. Where death or injury may be caused by an agency lawfully in use, ordinary care requires that every reasonable means must be used to prevent it." "You are instructed that if in the exercise of ordinary care the defendant, Southern California Edison Company, should have placed a warning signal or device of some kind on the pole in question in order to avoid collisions with the said pole by persons lawfully using Alameda street, then you are instructed that the defendant, Southern California Edison Company, was guilty of negligence. * * * The only thing I am telling you is that the law is that it was the duty of the Southern California Edison Company in maintaining that pole to use ordinary care in the maintenance of that pole so that injury would not come to others; they must use ordinary care, do that which a reasonable person under like circumstances would do." " * * * The

fact that a pole was erected and maintained at a location where it could be and was hit by a vehicle does not in and of itself indicate that defendant was guilty of any negligence in maintaining a pole at such a location. Neither was defendant bound to find the best possible location for its poles, but only to use, in so doing, such degree of care as would a man of ordinary prudence under the same or like circumstances. If you find that the pole in question was so located and maintained, defendant was not guilty of any negligence in so doing, even though it was possible that automobiles using Alameda street might collide with the pole thus located and maintained. The use of a highway for vehicular traffic and for placing poles along the sides thereof for the purpose of lighting the highway and of supplying the inhabitants of the County with electric energy, are both proper street uses, and each use must, under the regulations prescribed by law, accommodate itself to the other use." "You are further instructed that the issue as to whether or not the pole was being negligently maintained at the time of the accident is properly a question of fact for the jury."

Defendant offered instructions which were refused, and about which refusal appellant now complains, which were, in substance, to the effect that defendant contended that it was possessed of the right to maintain the pole in question at the place where it was located; that this right came into existence prior to the dedication of the highway for highway purposes; that defendant had not at any time joined in the dedication or surrendered this right and that the same was in full force and effect on the day of the accident; that all persons using Alameda street, the street upon which said pole was located, did so subject to this right and at their own peril so far as the pole in question was concerned; and that if the jury believed from the evidence that defendant had such right that the verdict should be in favor of defendant; further, that no verdict should be returned against the defendant because it did not place or maintain lights on or near said pole.

In other words, it appears to be appellant's position that being the owner of an easement, it cannot be charged with negligence for not moving its pole to another location, even though under the circumstances ordinary prudence would have suggested such action, and that it was under no obligation to maintain a light on the

pole or keep it marked or barricaded so as to prevent automobiles from running into it.

The foregoing instructions, quoted at the expense of brevity, clearly indicate that the trial court rejected defendant's theory and thereby limited the issue to the question of negligence. A similar question was presented in *Anderson v. Southern California Edison Co.*, 77 Cal.App. 328, 246 P. 559, in which case the court announced the rule as follows (page 561): "The conclusion of appellant that plaintiff was a trespasser is based upon its claim that it had acquired an easement of right of way over the lands in question, and that this being so, defendant owed no duty to plaintiff to keep its premises safe. * * * The second theory advanced by appellant company for the support of its claimed easement rests upon a claim of title to the asserted right by adverse possession. We do not think we are here seriously concerned with the question of the respective rights of the owner of the land and the company in the easement in question. This is not an action between the parties to determine such rights. Assuming some interest in the land to exist in favor of the company or the public, to the unlimited and unrestricted right to have its wire pass over the lands, the question with which we are concerned is the duty of the company to exercise care in the use of the alleged easement."

In the light of the authority just quoted, the court's ruling in this connection was correct. The authorities relied upon by defendant relate to disputes between public service and quasi-public service corporations and landowners, in which cases the existence or extent of an easement is an indispensable issue. In the case at bar the question as to the existence of the easement and the extent of the easement is incidental, and is neither conclusive nor decisive. As in the *Anderson Case*, supra, the all-important question was one of negligence and the duty of the defendant to exercise care in the use of the alleged easement.

[6] The court further instructed the jury as follows: "And the burden here for any one alleging that the accident was caused by the sole negligence of the driver, Renne, the burden of proof is upon that person." Appellant argues that such instruction placed on defendant the burden of proof with respect to an issue in the nature of an affirmative defense, and in

that connection points out that no affirmative defense alleging the negligence of the driver of the automobile was pleaded. During the course of instructions to the jury the record reveals the following to have occurred:

"The Court: At the time of this accident, to wit, August 28, 1932, the California Vehicle Act [St.1923, p. 553, § 113, as amended by St.1931, p. 2120] then in full force and effect provided, among other things, as follows—and as far as this case is concerned, this law which I am about to give you is applicable to the case in so far as it may be applicable. * * * 'In any civil action'—and this is a civil action—the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence.' And the burden here for anyone alleging that the accident was caused by the sole negligence of the driver, Renne, the burden of proof is upon that person. I don't know whether the defendant has directly alleged that or not. Did you so allege among your different defenses that the accident, if it happened, was caused by the sole negligence of the driver?"

"Mr. Cunningham (Atty. for Appellant Edison Company): I believe we did. I will have to check that up. That has been our position in the case."

Elsewhere the jury was properly instructed as to the burden of proof. From an examination of the evidence as well as the instructions given, it cannot be said that the instruction, about which appellant complains, given in the manner above recited, misled the jury and resulted in a miscarriage of justice. Incidentally appellant's counsel appears to have, in effect, acquiesced in the alleged error, which a different reply to the court's inquiry might have prevented.

[7] Finally, with regard to appellant Edison Company's contention that the evidence of negligence does not support the verdict, it should be noted that this question was decided adversely to appellant in the *Gerberich Case*, supra, and although the present appeal involves added parties plaintiff, the evidence is substantially the

same. If there was no reason then for disturbing the verdict on such grounds, there can be no reason now. The motion for judgment notwithstanding the verdict was therefore properly denied.

[8] Referring now to the appeal of Marguerite Olivera, as special administratrix of the estate of Walter E. Olivera, deceased, from the judgment in favor of defendant Edison Company notwithstanding the verdict in favor of plaintiff and appellant, it appears that Marguerita Olivera (Van Klaveren), the minor daughter of Walter E. Olivera, was one of the persons injured in the accident out of which the actions herein arose. Walter E. Olivera incurred liability for medical expenses on account of the injury to his daughter Marguerita. Suit was filed by said Walter E. Olivera, but before the date of trial said Olivera died. Marguerite Olivera, as special administratrix of the estate of Walter E. Olivera, was substituted as plaintiff and a supplemental complaint was filed and the action consolidated for trial with the other actions then pending. The jury returned a verdict in favor of the personal representative of Mr. Olivera's estate and a motion for judgment notwithstanding such verdict was granted, apparently on the sole ground of abatement.

As contended by appellant Marguerite Olivera, "The determination of this appeal hinges on the question whether the cause of action comes within the operation of the maxim *actio personalis moritur cum persona*; in other words, was the loss which was sustained by Walter E. Olivera, the decedent, a personal injury within the meaning of the maxim? It is appellant's contention that the maxim above quoted refers only to injuries to the person or reputation and does not include consequential damage of the type involved in this appeal." In other words, the estate of the original plaintiff became diminished in value by reason of medical expenses and loss of services and hence, it is urged by appellant, the estate is entitled to recoup the loss.

Sections 573 and 574 of the Probate Code provide for actions that may be maintained by executors and administrators as follows:

"§ 573. *Extent of power to sue and be sued.* Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, and all actions by the state of California or any political subdivision thereof founded upon any statutory liability of any person for support, maintenance, aid, care or necessities furnished to him or to his spouse, relatives or kindred, may be maintained against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates."

"§ 574. *Actions for trespass.* Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person."

That such an action did not survive at common law requires no citation of authority, and the sections above quoted contain no such authority. Obviously the action herein is not founded upon contract, and the daughter of the deceased by no process of reasoning can be included within the contemplation of the statute as a part of the "*property*" referred to therein. The court's order granting defendant's motion for judgment notwithstanding the verdict in favor of plaintiff was therefore correct.

For the foregoing reasons the judgments and order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.

11 Cal.2d 313

In re BANK OF SAN PEDRO.

**RICHARDSON, Superintendent of Banks,
v. HARPER.**

L. A. 15775.

Supreme Court of California.

May 25, 1938.

1. Statutes ☞158

Implied repeals of statutes by subsequent statutes are not favored.

2. Banks and banking ☞135

The Bank Act does not forbid the interdepartmental offset of a savings deposit against a debt owed by the savings depositor to the commercial department in determining the assets and investments of an insolvent bank. Gen.Laws 1931, Act 652, §§ 25-27; Code Civ.Proc. §§ 438, 440.

3. Banks and banking ☞135

A depositor in the savings department of a state bank in liquidation may set off his deposit against a loan from the commercial department of the bank under the Bank Act, notwithstanding lack of mutuality between the departments. Gen.Laws 1931, Act 652, §§ 25-27; Code Civ.Proc. §§ 438, 440.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Proceeding in the matter of the Bank of San Pedro, a banking corporation, in liquidation, wherein Roy P. Harper seeks to secure a set-off on a promissory note held by Friend W. Richardson, as Superintendent of Banks. From an order allowing the set-off, the Superintendent of Banks appeals.

Affirmed.

Prior opinion 69 P.2d 222.

Clock, McWhinney & Clock; Merritt D. Jergens, and John G. Clock, all of Long Beach, for appellant.

Sullivan, Roche & Johnson, of San Francisco, amici curiae.

Loucks & Phister, of San Pedro, for respondent.

PER CURIAM.

For the reason that with respect to the issue herein involved, in similar situations, a diversity of opinion appeared as between or among several respective jurisdictions, a hearing of the appeal in the instant case was ordered to be had in this court, after de-

cision of the original appeal by the District Court of Appeal. After careful consideration of the facts of the case and the law applicable thereto, this court is satisfied with, and hereby adopts as its own, the opinion and decision that was prepared by Mr. Justice Sturtevant of the Second Division of the District Court of Appeal, First District. It is as follows:

"This is an appeal from an order authorizing and directing Friend W. Richardson, as superintendent of banks, to allow a set-off on and to accept payment of the balance due and owing on a promissory note held by an insolvent bank now being liquidated by said superintendent.

"The order was made and based on an agreed statement of facts. Heretofore the Bank of San Pedro was organized to conduct and was conducting a banking business consisting of a commercial department, and a savings department under the Bank Act. St.1909, p. 87; Act No. 652, Deering's General Laws. The petitioner, Roy P. Harper, borrowed from the commercial department several thousand dollars on a collateral note secured by certificates of shares of prior preferred stock of the Van Camp Sea Food Company. About the same time he opened a savings account in the savings department of said bank. Large sums having been paid on the note, later a new collateral note was executed. On March 15, 1933, the superintendent of banks took possession of said bank, and, through a receiver, now holds possession. On May 20, 1933, said petitioner Roy P. Harper owed said bank on his note for said loan \$5,225, and the bank held collateral as security which was of the value of \$9,000 or more. At the same time the savings department of said bank owed to said Roy P. Harper on said savings account \$3,967.69. On said date last mentioned said Roy P. Harper demanded that the bank apply on his note the balance in the savings account, tendered to the bank the balance due on said note after such credit had been allowed, and demanded the return to him of his note and the collateral so held by said bank. The demand and tender were both refused and thereafter he filed a petition in the insolvency proceeding pending in the superior court praying for the order hereinabove mentioned.

"In presenting his appeal the superintendent of banks says: 'There is but a single question involved: whether or not a depositor in the savings department of a state bank in liquidation may set-off his deposit against

a loan in the commercial department of said bank.' The petitioner says: 'It is better stated thus: Does the Bank Act specifically forbid the interdepartmental offset of a savings deposit against a debt owed by the savings depositor to the commercial department in determining the assets and investments of an insolvent bank?'

[1-3] "The present Bank Act was approved March 1, 1909. Stats. 1909, p. 87. Prior to its enactment it had been decided that the contention which the petitioner now makes was legally sound as the law then stood. *People v. California, etc., Trust Co.*, 168 Cal. 241, 141 P. 1181, L.R.A.1915A, 299. The question is therefore reduced to an inquiry whether anything contained in the Bank Act has changed the rule of law declared in the case cited. An examination of the decision cited, and kindred decisions, discloses that each rested on the provisions of sections 438 and 440 of the Code of Civil Procedure. The question is therefore further limited as to whether the present Bank Act has any provisions which in any respect work a repeal of said sections. A comparison of said sections with the numerous provisions of the Bank Act shows no conflict whatever. No express repeal is even suggested. Repeals by implication are not favored and the Bank Act contains no words to the effect that proceedings thereunder are an exception to the general laws governing the rule of procedure.

"The appellant calls to our attention the facts that the Bank of San Pedro was organized into departments; that the petitioner owed the commercial department; that it was the savings department which owed petitioner; and he contends there could be no set-off. That contention is but to assert that there was no mutuality. But mutuality is not always controlling. In the instant case it was not controlling. The day before the Bank of San Pedro was taken over by the appellant, if either the petitioner had sued the bank, or the bank had sued the peti-

tioner, it is clear that the other could have set-off his or her claim. The same condition existed in *People v. California, etc., Trust Co.*, supra. Speaking to the point, on page 249, 141 P. on page 1185, the court said: 'We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, notwithstanding the respective demands are not mutual, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off against the claim of the other; that the right of the parties in that respect were reciprocal, and, as we have said, the insolvency of the bank did not affect the right of either to have this subsequently done.' So, here, for precisely the same reasons the insolvency of the Bank of San Pedro did not affect the right of set-off existing in either party.

"The appellant cites and relies on the provisions of sections 25, 26 and 27 of the Bank Act as establishing the rule for which he contends. We think they do not do so. The primary purpose in enacting the Bank Act was to protect the public. To that end, as restrictions on the officials of the bank, while it was a going concern, said sections were enacted. But neither the primary purpose in enacting said act, the history of the times, nor any other reason suggested in the briefs called for provisions taking from any single customer of the bank any of his former statutory rights such as those expressed in sections 438 and 440 of the Code of Civil Procedure. We find no language in said act which purports to do so. The petitioner cites and relies on *Greva v. Rainey*, 2 Cal. 2d 338, 41 P.2d 328. It is not in point, but all we have said we believe to be in accord with that decision."

The order appealed from is affirmed.

KELLY et al. v. KELLY.
L. A. 15021.

Supreme Court of California,

June 1, 1938.

As Modified June 30, 1938.

1. Trusts ⇨12

Under Pennsylvania law spendthrift provisions are valid as to corpus of the trust estate.

2. Trusts ⇨12

Under Pennsylvania law decree for support and maintenance may not, in some circumstances, be subject to limitation by spendthrift clause of instrument creating trust.

3. Judgment ⇨822(3)

Where question whether spendthrift clause in will under which husband was entitled to share in corpus of trust estate after death of life beneficiary was determined in proceeding in Pennsylvania court in which testator's estate was pending wherein husband and wife appeared separately, question was not open for determination in subsequent action by husband in California to invalidate property settlement agreement whereby husband assigned to wife one-half interest in property which husband might thereafter acquire by gift, inheritance, or devise, especially in absence of showing that any of trust estate was ever located in California.

4. Attachment ⇨58**Trusts** ⇨147(1), 152

The fact that a spendthrift trust is not subject to voluntary alienation by the cestui-que trust nor subject to involuntary alienation through attachment or other process at the suit of his creditors is of the essence of a spendthrift trust.

5. Trusts ⇨152

After the beneficiary of a spendthrift trust has actually received the trust property, his creditors may reach it and he may dispose of it as he wishes.

6. Trusts ⇨147(1)

A voluntary assignment of trust property executed by the beneficiary of a spendthrift trust before payment to him confers on the assignee no right to demand payment or delivery from the trustee as it becomes due to the beneficiary.

7. Attachment ⇨58**Trusts** ⇨152

Intent of the trustor in creating a spendthrift trust is that the benefit shall reach

the hands of the cestui que trust free from liens and attachments.

8. Trusts ⇨152

A will creating a trust the corpus of which was to be distributed to descendants of life beneficiary and providing that bequest should be taken as made to person entitled free and clear of his debts, contracts, engagements, alienations, and anticipations, and of all responsibility therefor, manifested intent of testator that beneficiary should receive trust property free and clear of specific liens and charges.

9. Trusts ⇨147(1)

Under will creating trust, the corpus of which was to be distributed to descendants of life beneficiary and providing that bequest should be taken as made to person entitled free and clear of his debts, contracts, engagements, alienations, and anticipations, and of all responsibility therefor, a descendant of a life beneficiary on receipt of trust property did not hold such property or its proceeds in trust for his assignee under an assignment made prior to his receipt of the trust property.

10. Trusts ⇨147(1)

Under will creating trust, the corpus of which was to be distributed to descendants of life beneficiary, and providing that bequests should be taken as made to person entitled free and clear of his debts, contracts, engagements, alienation, and anticipations, and of all responsibility therefor, an assignment by a descendant of a life beneficiary made prior to his receipt of trust property in the nature of a promise to pay or turn over trust property when received by him was not wholly invalid, but usual remedies for breach of contract were available to promisee.

11. Damages ⇨126

Ordinarily damages for breach of contract to turn over trust property when received by person entitled thereto under trust instrument containing spendthrift clause will be value of property the promisee would have received had the beneficiary performed his promise to turn over a fraction of the trust property on its receipt.

12. Attachment ⇨58**Execution** ⇨41

After recovery of judgment against beneficiary of trust created by instrument containing spendthrift clause, for damages arising from beneficiary's breach of contract to turn over trust property received by him,

promisee may levy on property of the beneficiary not exempt from execution, including property received by beneficiary from trust, since such property after receipt by the beneficiary is subject to attachment and execution for debts and engagements contracted before as well as after the receipt of the trust property.

13. Trusts Ⓒ147(1)

In wife's suit against husband for one-half the trust property received by husband under will containing spendthrift clause wherein wife asserted rights under property settlement agreement executed before husband received trust property and prayed in alternative for value of property she would have received had defendant performed his promise, wife was entitled to judgment for damages in amount of property which she would have received had defendant husband performed his promise, where wife was not entitled to one-half of specific trust property because of operation of spendthrift clause of will.

14. Husband and wife Ⓒ279(1)

A property settlement agreement, reciting that husband assigned to wife one-half interest in property which husband might receive or become entitled to by gift, inheritance, bequest, or as beneficiary of any trust, constituted contract to pay over one-half trust benefits to which husband was entitled under will when received, notwithstanding that words of present assignment were used.

15. Assignments Ⓒ9

Generally, equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and those which rest only in possibility provided they are fairly made and not against public policy.

16. Trusts Ⓒ152

The protection of a spendthrift clause of a trust instrument will be limited to the extent necessary to support and educate the cestui que trust in the manner to which his station in life has accustomed him.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Mary Bowen Kelly, individually and as trustee for Robert Bowen Kelly and another, and Robert Bowen Kelly and another, by Mary Bowen Kelly, their guard-

ian, against Edward Rudolph Kelly, for money received by the defendant on termination of a testamentary trust. Judgment for defendant, and plaintiffs appeal, and during the pendency of the appeal Thomas McCarty, special administrator of the estate of Edward Rudolph Kelly was substituted as defendant on the death of the defendant.

Reversed.

John H. McCorkle and Hamilton, Lindley & Higgins, all of San Diego, for appellants.

Richard M. Kew, of San Diego, for respondent.

SEAWELL, Justice.

Plaintiff individually and as guardian and trustee of her two minor sons brought this action to compel defendant, her former husband, to pay to her one-half of all money and property received by him upon the termination of a testamentary trust, under which said defendant and others became entitled to share in the distribution of the corpus of the trust property. Plaintiff Mrs. Kelly claims this right against defendant by virtue of a property settlement executed prior to the termination of the trust and while they were husband and wife. The court below upheld defendant's contention that by reason of the fact that the instrument creating the trust contained a spendthrift clause plaintiffs were not entitled to receive any part of the trust estate from defendant. Plaintiffs appeal from the judgment for defendant. Pending this appeal defendant died and Thomas McCarty, special administrator of his estate, has been substituted as defendant and respondent.

The property settlement under which plaintiff Mrs. Kelly claims on behalf of herself and her minor sons was executed on March 30, 1928, by the Kellys "for the purpose of forever settling their property rights." It provided that property of record in the name of either party should be the separate property of such party. Under this provision the wife received the home in San Diego in which they resided and also a quarter block in the Point Loma district in San Diego, and Mr. Kelly was the owner of a house and lot in San Diego.

The agreement contained the following provision, which is the basis of the instant action:

"Second, the party of the first part [Mr. Kelly] hereby grants and assigns to the party of the second part a one-half interest in any and all property of any and every kind to which first party may now be entitled, or of which he may hereafter receive or become entitled to, by gift, inheritance, bequest, or as beneficiary of any trust, of which one-half, one-third of such half shall belong to the party of the second part [Mrs. Kelly], in fee and in perpetuity, and to her heirs and assigns forever, but the other two-thirds of such one-half interest, the party of the second part takes and shall take in trust, holding for her own use only for herself the rents, issues, and profits for her life only, the remainder to be held by her in trust for Robert Bowen Kelly and Charles Edward Kelly, children of the parties hereto, share and share alike, and to their heirs and assigns forever."

Said agreement further provided that in the event of a divorce between the parties, the provisions of the agreement should be deemed a property settlement, and should be incorporated in the decree of divorce in lieu of any and all other provisions for either division of property or alimony.

In October, 1928, seven months after the agreement was executed, Mrs. Kelly commenced suit for divorce. Upon defendant's filing an answer in which he alleged that the property agreement was void, Mrs. Kelly dismissed the action before trial. The parties were subsequently divorced, but neither the time, place, nor party on whose application the divorce was granted appears herein. Nor does it appear whether said agreement was approved, nor whether other provision was made for the support of Mrs. Kelly and the two children by the decree of divorce.

The provision of paragraph Second above set forth was made in anticipation of the termination of two trusts upon the death of defendant's mother, and not in anticipation of any other expected contingencies. Said two trusts were created by the wills of Thomas Smith and Mary E. K. Smith. Under said wills the income of the trust property was to be paid to named beneficiaries for life, and upon the death of the last survivor of said beneficiaries the trust was to terminate and the corpus distributed to the descendants of the life beneficiaries per stirpes. Defendant's mother, Elizabeth B. Kelly, was the last survivor of the named life beneficiaries. She died in December, 1928. The two trusts were being adminis-

tered by the Pennsylvania Company for Insurance of Lives and Granting Annuities, as trustee named in said wills. The Thomas Smith trust contained a spendthrift clause as follows:

"By my present testamentary provisions, it is my desire to benefit only the respective beneficiaries, to the utter exclusion of their creditors and alienees, past, present and future, and it is my wish to guard them against themselves, and their own waste and improvidence. I therefore direct that every bequest, annuity, and devise herein made and given shall be taken as made and given, to the persons respectively entitled, free and clear of his or her debts, contracts, engagements, alienations and anticipations, and of all responsibility therefor. Such legacies, annuities and devises shall be paid and conveyed, to the respective beneficiaries without regard to any liens or attachments."

Mrs. Kelly admitted that when the property settlement was executed in 1928 she was informed of the spendthrift clause in the will of Thomas Smith. Thomas Smith died on May 20, 1883, a resident of Pennsylvania. No contention is made that any part of the trust property was ever located in California. Following the death of defendant's mother, the last survivor of the named life beneficiaries, the trustee filed its petition in the orphans' court of Philadelphia county, Pennsylvania, in which the will of Thomas Smith had been probated and the trust property distributed to the trustee, wherein said trustee prayed for distribution of the trust property in accordance with the will of the testator. Both plaintiff herein, Mary Bowen Kelly, and defendant, Edward Rudolph Kelly, appeared separately by their respective attorneys in this proceeding in the orphans' court in Pennsylvania. On March 4, 1930, the auditing judge ruled that by virtue of the spendthrift clause in the will of Thomas Smith the defendant's share of the corpus was required to be paid by the trustee directly to Edward Rudolph Kelly, and refused to order distribution of any part of his share to the claimant Mary Bowen Kelly. Mrs. Kelly filed exceptions to this order of the auditing judge, but it was confirmed on May 2, 1930.

In the instant action in this state Mary Bowen Kelly lays claim to one-half of the money and other personal property distributed to Edward Rudolph Kelly by the above decree of the Philadelphia county court. The instant action does not concern any

property derived by defendant from the Mary E. K. Smith trust. This trust did not contain a spendthrift clause. Relying on the property settlement, Mary Bowen Kelly has collected more than \$11,000 from the trustee of said trust.

On October 25, 1929, after filing of their separate appearances in the Pennsylvania court, Edward Rudolph Kelly commenced an action in this state against Mary Bowen Kelly as the sole defendant, in which he prayed that the court adjudge the property settlement of March, 1928, invalid, and enjoin said defendant from asserting any right to trust funds. The court granted a temporary injunction. This action came to trial in July, 1930, after the Pennsylvania decree had been confirmed. The trial court adjudged in the action in this state that the property settlement was a valid contract and dissolved the temporary injunction. This judgment was affirmed on appeal. *Kelly v. Kelly*, 129 Cal.App. 325, 18 P.2d 781. Plaintiff Edward Rudolph Kelly had contended therein, among other points, that the agreement was void for uncertainty, that he had entered into it under a mistaken knowledge of the law, and of his legal rights, and that it was invalid because there was "no guaranty that the supposed object of the parties in executing this agreement, to wit, the provision for the care and maintenance of the minor children, would be carried out".

[1,2] Plaintiff did not allege nor contend in said action that by virtue of the spendthrift clause in the will of Thomas Smith his interest in the corpus of the trust estate was not subject to said property settlement, nor pray that on such ground Mary Bowen Kelly should be restrained from collecting any portion of his share in the corpus of the Thomas Smith trust. As noted above, prior to the trial of this former California action in July, 1930, it had been determined by decree of the Pennsylvania court that by virtue of the spendthrift clause the property settlement agreement did not operate upon Edward Rudolph Kelly's share in the corpus of the trust estate in the hands of the trustee, and said property was required to be distributed directly to Edward Rudolph Kelly. The Pennsylvania court had held that the spendthrift provision applied to the corpus which was to be paid to defendant upon the death of the life beneficiaries, as well as to the income paid to the life beneficiaries, and exempted the entire interest of Edward Rudolph Kelly in the corpus in the hands of the trustee from the property

settlement agreement. Pennsylvania decisions sustain the validity of spendthrift provisions as applied to the corpus. *Beck's Estate*, 133 Pa. 51, 19 A. 302, 19 Am.St.Rep. 623; *Goe's Estate*, 146 Pa. 431, 23 A. 383, 28 Am.St.Rep. 805; *Re Estate of Hall*, 248 Pa. 218, 93 A. 944, 2 A.L.R. 855; see, also, *Boston Safe Deposit & Trust Co. v. Collier*, 222 Mass. 390, 111 N.E. 163, Ann.Cas.1918 C, 962; *Hopkinson v. Swaim*, 284 Ill. 11, 25, 119 N.E. 985; *Von Kesler v. Scully*, 267 Ill.App. 495. The Pennsylvania court further held that the agreement that Mary Bowen Kelly should receive a share of Edward Rudolph Kelly's interest in the trust property was not analogous to a court decree for support and maintenance, recognized under certain circumstances in Pennsylvania as not subject to limitation by a spendthrift clause. *Moorehead's Estate*, 289 Pa. 542, 137 A. 802, 52 A.L.R. 1251. As pointed out above, Pennsylvania was the residence of the testator, and there is no suggestion that any of the trust estate, real or personal, was ever located in California. Nor did defendant ever bring said property to this state after its receipt by him, according to his testimony.

[3] Thus the question whether the spendthrift clause in the will of Thomas Smith rendered the interest of Edward Rudolph Kelly inalienable while in the hands of the trustee was determined in the proceeding in Pennsylvania in which the trustee and also plaintiff and defendant herein appeared separately. That question was not open for determination in the proceeding subsequently tried in this state in July, 1930, and in fact no attempt was made to relitigate this matter in said former proceeding, the judgment in which was affirmed by the Appellate Court. *Kelly v. Kelly*, supra.

The 1930 action in this state, brought to obtain an adjudication that the property settlement was invalid and to restrain Mrs. Kelly from collecting funds in the hands of the trustee, had a purpose notwithstanding the entry of the Pennsylvania decree before the California action came to trial. Plaintiff Edward Rudolph Kelly in said California action was seeking to restrain Mrs. Kelly from collecting any part of his share in the Mary E. K. Smith trust, which was ready for settlement, and which contained no spendthrift provision. The Pennsylvania decree concerned only the Thomas Smith trust.

The present action was commenced by Mrs. Kelly on August 14, 1933, more than

three years after the order of the Pennsylvania court denying the claim of Mrs. Kelly for payment to her by the trustee of one-half of Mr. Kelly's share in the corpus of the Thomas Smith trust. She prayed that Edward Rudolph Kelly be declared trustee for her and her two minor sons of one-half of all money and property received by him as his share of the Thomas Smith trust, that he be required to turn over to her one-half of said property, and if this was impractical that she have judgment against him for the value of said one-half of the property.

In the present action plaintiff contends that the Pennsylvania decree simply determined that plaintiff could not reach Edward Rudolph Kelly's share of the Thomas Smith trust while it remained in the hands of the trustee; that said decree was not intended to determine plaintiff Mary Bowen Kelly's right to reach the trust property after it had left the possession of the trustees and had been turned over to Kelly. The trial court found in accordance with this contention, but it nevertheless held that plaintiff Mary Bowen Kelly had no rights in the fund in the hands of her former husband paid to him from the Thomas Smith trust.

[4-6] It is of the essence of a spendthrift trust that it is not subject to voluntary alienation by the cestui, nor subject to involuntary alienation through attachment or other process at the suit of his creditors. *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 155 P. 995, Ann.Cas.1917 D, 1050; *Seymour v. McAvoy*, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544; *San Diego Trust & Savings Bank v. Heustis*, 121 Cal. App. 675, 10 P.2d 158; *Canfield v. Security First Nat. Bank*, 8 Cal.App.2d 277, 48 P.2d 133; 1 *Bogert, Trusts and Trustees*, p. 75, § 18; 43 *Harvard Law Review*, 84; 21 *Cal.Law Rev.* 142; 22 *Cal.Law Rev.* 482. But it is everywhere agreed that after the beneficiary has actually received the trust property his creditors may reach it and he may dispose of it as he wishes. *Beck's Estate*, supra; *Goe's Estate*, supra; *Board of Charities & Corrections of City of Philadelphia v. Lockhard*, 198 Pa. 572, 574, 48 A. 496, 82 Am.St.Rep. 817; 1 *Bogert, Trusts and Trustees*, p. 717, § 222; 43 *Harvard Law Rev.* 84; 22 *Cal.Law Rev.* 492; 21 *Cal.Law Rev.* 143. A voluntary assignment executed before payment to the beneficiary confers on the assignee no right to demand payment or delivery from

the trustee as it becomes due to the beneficiary. The Pennsylvania court in a proceeding in which the trustee and Mr. and Mrs. Kelly, separately, appeared, has determined that Mr. Kelly's entire share of the corpus in the possession of the trustee was subject to the spendthrift clause and all payable directly to him. But does the assignment to Mrs. Kelly executed during the continuance of the trust nevertheless give her as such assignee a claim upon the trust property after it shall reach the hands of the beneficiary?

[7] It is the intent of the trustor in creating a spendthrift trust that the benefits shall reach the hands of the cestui free from liens and attachments. A provision commonly found in spendthrift clauses is that the beneficiary shall not "anticipate" his right to receive trust benefits. The provision in the Thomas Smith will was that every bequest should "be taken as made and given, to the persons respectively entitled, free and clear of his or her debts, contracts, engagements, *alienations* and *anticipations* and of all responsibility therefor". If, as contended by Mary Bowen Kelly herein, the one-half of the property received by Edward Rudolph Kelly from the Thomas Smith trust is held by him in trust for her by virtue of the antecedent property settlement, then Edward Rudolph Kelly has not received said property free and clear as directed by the trustor, but subject to a charge in favor of Mary Bowen Kelly, and said Edward Rudolph Kelly has anticipated his interest in the trust estate.

[8-12] We are of the view that the intention of the trustor that the beneficiary should receive the trust property free and clear of specific liens and charges may and should be given effect. But although it cannot be held that the beneficiary, upon receipt of trust property, in turn holds said specific property, or its proceeds, in trust for his assignee under an assignment made prior to his receipt of the trust property without doing violence to the intent of the trustor to the effect that the beneficiary shall receive the property free of liens and charges, we are of the view that an assignment by the beneficiary, in the nature of a promise to pay or turn over trust property when received by him, is not wholly invalid. Although such an assignment or promise gives the promisee no right in specific trust property received by the beneficiary, or in its proceeds, such promisee has available to him the usual remedies for breach of

contract and may sue to recover damages for breach of said contract, in which the damages will ordinarily be the value of the property the promisee would have received had the beneficiary performed his promise to turn over a fraction of the trust property upon its receipt. Having obtained a judgment for damages, the promisee may levy upon property of the promisor not exempt from execution, including property received by him from the trust, since such property after receipt by the promisor-beneficiary is subject to attachment and execution for debts and engagements contracted before as well as after the receipt of the trust property by the beneficiary.

[13] In the event she was not entitled to judgment for one-half of the specific trust property, or its proceeds, the plaintiff herein prayed for judgment for the value of the property she would have received had defendant performed his promise. We are of the view that she was entitled to such judgment.

[14,15] There is no difficulty in construing the property settlement agreement as a contract to pay over one-half the trust benefits when received, although words of present assignment are used. In fact such construction is authorized by the principles laid down by this court in *Bridge v. Kedon*, 163 Cal. 493, 126 P. 149, 43 L.R.A.,N.S., 404, holding that the attempted assignment by an heir of his expectant interest in the estate of his mother, although nonassignable under the provisions of the Civil Code, could be enforced in equity as a contract to assign after the mother's death against the property which actually descended to him. It is there said (page 151): "The California cases * * * state the rule as a general one that equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and those which rest only in possibility, provided they are fairly made and not against public policy." See 21 Cal.L.Rev. 394, and 22 Cal.L.Rev. 446. In *Cheek v. Farmers, etc., Nat. Bank*, 14 Cal.App.2d 176, 57 P.2d 1325, this rule was applied to the assignment of the interest of a beneficiary under a trust. It is true that in both the

cited cases the courts went further and held that the contract created a lien which attached to the assigned property as it reached the hands of the assignor but, for the reasons already given, to enforce a lien in the present case would defeat the purpose of the trustor. However, the treatment of the assignment as a contract to assign does no violence to the trust intent.

[16] The application of these principles to the attempted assignment of his interest by the beneficiary of a spendthrift trust is suggested by the Restatement of the Law of Trusts, section 152, subdivision k; *Griswold on Spendthrift Trusts*, section 375, pages 340-342, and in an article by the same author appearing in 43 *Harvard Law Review* 63. As in *Bridge v. Kedon*, it is there recognized that the question of the application of these principles in a particular situation is one of policy. We find no requirements of public policy which preclude their application here or compel the protection of the proceeds of a spendthrift trust after they have reached the hands of the beneficiary from the incidents of an otherwise valid engagement entered into during the life of the trust. Especially is this conclusion strengthened by the consideration that it is the policy of this state to limit the protection of the spendthrift clause to the extent necessary to support and educate the cestui in the manner to which his station in life has accustomed him. *Canfield v. Security First Nat. Bank*, 8 Cal.App.2d 277, 48 P.2d 133; see, also, 22 Cal.L.Rev. 471; 21 Cal.L.Rev. 142; *Bogert, Trusts and Trustees*, vol. 1, § 222.

For the reasons given, we are not impressed by the argument of the court in *Bixby v. St. Louis Union Trust Co.*, 323 Mo. 1014, 22 S.W.2d 813, which reaches a contrary result and is criticized by Professor *Griswold* in the articles cited above.

The plaintiffs are entitled to judgment for breach of the contract to assign, in which the measure of damages is the value of the property which the defendant would have turned over to them had he kept his promise.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.

PEOPLE v. McKENNA.

Cr. 4149.

Supreme Court of California.

May 27, 1938.

As Modified on Denial of Rehearing

June 25, 1938.

1. Forgery $\hookrightarrow$ 12(2, 4)

The test in determining whether the crime of "forgery" has been committed is whether on its face the forged instrument will have the effect of defrauding one who acts on it as genuine, and whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability is immaterial. Pen.Code, § 470.

[Ed. Note.—For other definitions of "Forgery," see Words & Phrases.]

2. Forgery $\hookrightarrow$ 12(3)

A deed which conveys no title may be the subject of forgery. Pen.Code, § 470.

3. Forgery $\hookrightarrow$ 9, 10

A false assignment purporting to transfer notes and mortgages which were the subject of dispute in two actions instituted by defendant in her daughter's name to enjoin foreclosure and to quiet title, and a letter containing false insertions stating that mortgagee intended to convey all interest in notes and mortgages, could be the basis for a charge of forgery where they were made with intent to defraud. Pen.Code, § 470.

4. Forgery $\hookrightarrow$ 47

Whether defendant, with intent to defraud prepared a false assignment of notes and mortgages which were the subject of dispute in two actions instituted by defendant in her daughter's name to enjoin foreclosure and to quiet title, and whether defendant inserted in a letter false statements that mortgagee intended to convey all interest in notes and mortgages, were for jury in forgery prosecution. Pen.Code, § 470.

5. Obstructing justice $\hookrightarrow$ 5

Where defendant instituted two actions in her daughter's name to enjoin sale of property at foreclosure and to quiet title to property described in mortgages, alleging that daughter had acquired all of mortgagee's interest, and allegations were denied by mortgagee's administrator who was defending actions, introduction of a false assignment of mortgage and of a letter containing a false insertion stating that mortgagee intended to convey all her rights sustained charge of preparing and offering false evidence, since assignment and letter were

material to issues in those actions. Pen. Code, §§ 132, 134.

6. Criminal law $\hookrightarrow$ 388

In forgery prosecution, an exemplar offered by defendant to show that one of the people's exhibits was not a correct representation was properly rejected, where exhibit was received on proof that it had been made in a certain way, and undisputed testimony in connection with exemplar established that paper used in making it was not the same as that used in making exhibit introduced by the district attorney.

7. Criminal law $\hookrightarrow$ 388

An exemplar is not admissible in evidence unless it is shown that it was made under the same conditions as the one which it seeks to disprove.

8. Witnesses $\hookrightarrow$ 274(2)

In absence of a showing of bad faith, a character witness may be cross-examined to determine whether he has heard the person whose reputation is under investigation accused of conduct inconsistent with character attributed to him by witness.

9. Witnesses $\hookrightarrow$ 274(2)

Cross-examination of defendant's character witnesses, to ask them whether their opinion of her reputation for truth, honesty, and integrity in the community would be changed if they had heard her character questioned because of certain acts done or statements made by her, was proper.

10. Forgery $\hookrightarrow$ 39

Obstructing justice $\hookrightarrow$ 15

In prosecution for forgery, perjury, and preparing and offering false evidence in two actions instituted by defendant in her daughter's name to enjoin the sale of property on foreclosure and to quiet title to property described in mortgages, admitting into evidence decree in those actions in favor of the defendant therein and against daughter, and allowing decree to be read to jury, were not erroneous rulings, since decree was evidence showing that defendant in the two actions had a valid claim of title to property. Pen. Code, §§ 132, 134, 470.

11. Criminal law $\hookrightarrow$ 1172(6)

An instruction stating that it was the right of the trial judge or counsel to comment on the failure of the defendant to explain or deny any evidence against her was not prejudicial where no such comment was made.

12. Criminal law $\S$ 792(2)

In prosecution for forgery, perjury, and for preparing and offering false evidence, an instruction defining conduct amounting to aiding and abetting another in the commission of a crime was properly given, where evidence authorized finding that defendant did not personally type or prepare forged documents, but that she aided and abetted another in doing so. Pen.Code, §§ 132, 134, 470.

13. Criminal law $\S$ 791

In prosecution for perjury, forgery, and for preparing and offering false evidence in two actions instituted by defendant in her daughter's name to enjoin the sale of property on foreclosure and to quiet title to property described in mortgages, an instruction that a mortgagor and mortgagee may each have separate and distinct interests in the same property at the same time was not objectionable on ground that a complete title by merger in daughter had been proved, where no such title had been proved. Pen. Code, §§ 132, 134, 470.

14. Criminal law $\S$ 823(12)

An instruction stating that the testimony of a witness is corroborated when it is shown "to comport with some facts otherwise known or established by the evidence" was not prejudicial, even if word "known" was not a typographical error, and instruction was given as it appeared in transcript, where jurors were elsewhere clearly charged that they must render their verdict on the evidence.

15. Criminal law $\S$ 761(9)

In prosecution for forgery, perjury, and for preparing and offering false evidence in two actions instituted by defendant in her daughter's name to enjoin the sale of property on foreclosure and to quiet title to property described in mortgages, instructions assuming that defendant had offered letter containing false insertions in evidence were not erroneous, where defendant admitted that she introduced letter in evidence in those actions. Pen.Code, §§ 132, 134, 470.

16. Criminal law $\S$ 829(1)

Refusing to give a defendant's requested instructions was not error, even though they were wholly or partly correct, where they were fully and fairly covered by the trial judge in other instructions given.

17. Criminal law $\S$ 1174(1)

Newspaper reports, printed during trial, stating that certain files of evidence in

judge's chambers and district attorney's offices had been ransacked and quoting judge and deputy district attorney as saying they were positive some person facing trial had sought to locate and destroy incriminating documents or other evidence, were not prejudicial, where none of the articles mentioned defendant, and record did not show that any of them were ever seen by any juror.

18. Criminal law $\S$ 491(2)

An expert witness' testimony that his opinion that a document was a forgery was based on an examination of the negative of a photograph of the document did not impeach his opinion, where negative was sufficiently identified, and witness explained that certain things which cannot be seen on a positive print appear on a negative one, because each additional photographic process eliminates a certain amount of details in the subject photographed.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Catherine A. McKenna was convicted of perjury, of offering false evidence, of preparing false evidence, and of forgery, and she appeals from the judgments and from an order denying her motion for a new trial.

Affirmed.

For prior opinion, see 73 P.2d 673.

Rehearing denied; HOUSER, J., dissenting.

Catherine A. McKenna and Charles Ostrom, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

EDMONDS, Justice.

The defendant has appealed from a judgment of conviction upon each of seven counts of an indictment, and from an order denying a new trial. By the first count of the indictment the defendant was charged with perjury; in the next two it is alleged that she offered false evidence in violation of the provisions of section 132 of the Penal Code; by two other counts she was charged with preparing false evidence in violation of the provisions of section 134 of the Penal Code; and in the last two counts it is alleged that the defendant committed forgery.

In 1915 George W. Pierson and his wife executed and delivered two notes payable to Edward Russek, each secured by a

mortgage on real estate in which he was named as mortgagee. Later the defendant, who is an attorney at law, acquired the property described in these mortgages, and the notes and mortgages, passed to Louie S. Dexter. Thereafter a foreclosure action was commenced by Mrs. Dexter. In this action a decree of foreclosure was rendered in favor of H. B. Busing, as administrator of Mrs. Dexter's estate, she having died while the litigation was pending. This decree was affirmed upon appeal. *Busing v. Pierson*, 1 Cal.2d 495, 36 P.2d 116.

Some time later and before the property had been sold under the decree of foreclosure, the defendant conveyed it to W. P. Nichols, her daughter, and commenced two actions, one to enjoin the sale of the real property and the other to quiet title. In each of these cases the daughter was named as plaintiff. When they came on for trial, they were consolidated and Mrs. McKenna on behalf of the plaintiff offered two written documents in evidence, each of which was received and marked as an exhibit. The charges upon which the defendant has been convicted are based upon them.

One of the exhibits is a letter to the defendant dated July 16, 1936, written by Stephen B. Dexter, who was the husband of Louie S. Dexter, and acknowledged before a notary public. It reads as follows:

"Dear Mrs. McKenna:

"In keeping with the proposition made to you on yesterday touching upon certain quitclaim deeds to be issued to you covering the certain properties contained in two mortgages for \$800 each, given a number of years ago by one George Pierson, said properties being located in the Ela View Tract, this City and County, I am enclosing said deeds, *which are intended to and do convey all interest in and to said mortgages and notes, to grantee.*

"In further keeping with our understanding on this matter, I have notified the Administrator of the Estate of Louie S. Dexter, deceased, of my course of action in this matter, as above stated, and have stated to him that any and all equity that Louie S. Dexter might have in this property as evidenced by that certain suit of *Louis S. Dexter v. George M. Pierson et al.*, #200705, Superior Court, Los Angeles, California, should be identified and considered by him as having been passed

over to yourself, *as all of Louie S. Dexter's interest was passed to Golden State Holding Co. prior to her death.* This statement is given under Notary Seal at your request.

"Very truly yours,

"[Signed] Stephen B. Dexter

"Stephen B. Dexter."

Another document offered in evidence by the defendant is a photostatic copy of a purported "Assignment of Mortgage" signed by Louie S. Dexter. This instrument recites that "I, Louie S. Dexter, do by these presents grant, bargain, sell and assign, transfer and set over unto the Golden State Holding Company those two certain Indentures of Mortgages", executed by George M. Pierson and wife to Edward Russek. A certificate signed "Elliott H. Barrett", Notary Public, states that Louie S. Dexter acknowledged to him that she executed this assignment. The contention of the prosecution is that the defendant inserted the italicized words in the letter after it was received by her from Mr. Dexter and that she made the photostat, or had it made under her direction, by photographing parts of several writings and signatures affixed to them.

After the cases were submitted for decision, they were reopened for further evidence. The defendant then testified that the letter offered and received in evidence was in the same form as when she received it from Mr. Dexter and that she had obtained the "Assignment of Mortgage" from the corporate records of Golden State Holding Company.

The defendant advances a number of points which she relies upon for reversal. First, she contends that her demurrer to counts VI and VII, which charged her with forgery, should have been sustained since neither of the documents offered and received in evidence could be the subject of forgery within the meaning of section 470 of the Penal Code. Next, she claims that the evidence is insufficient to sustain the verdicts. Another contention is that neither of the documents were material to any issue in the cases in which they were offered and received in evidence. Other claims of error relied upon concern the admission or rejection of evidence and the refusal of the trial court to give certain instructions offered by the defendant. She also asserts that the district attorney was guilty of misconduct when, during the trial of the case, he released to the press in-

formation that the files in the courtroom where defendant was being tried had been rifled.

[1,2] The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. Sec. 470, Pen. Code. Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine. *People v. Gayle*, 202 Cal. 159, 259 P. 750; *People v. Thorn*, 138 Cal.App. 714, 33 P.2d 5; *People v. Munroe*, 100 Cal. 664, 35 P. 326, 24 L.R.A. 33, 38 Am.St.Rep. 323. A deed which conveys no title may be the subject of forgery. *People v. Baender*, 68 Cal. App. 49, 228 P. 536.

[3] Measured by these rules each instrument is one which could be the basis for a charge of forgery. The "Assignment of Mortgage" purports to transfer notes and mortgages, the subject of dispute in the consolidated cases, from Louie S. Dexter to Golden State Holding Company. This transfer was a necessary link in the chain of title sought to be proved by W. P. Nichols. The letter might, and possibly did, pass as a binding declaration against interest in the consolidated cases. The making of the alterations and the introduction of the letter in evidence clearly show that the person doing these things intended to defraud another. Whether the letter could have had any actual legal effect is immaterial. The demurrers to counts VI and VII charging the defendant with the forgery of these two instruments were properly overruled.

[4] Upon the merits there is substantial evidence to support the verdicts. On behalf of the People, Mr. Dexter, the writer of the letter, testified that as signed by him it did not include the portions which the indictment charges the defendant with adding. As the president and manager of Golden State Holding Company, he testified that the records of the corporation did not include the "Assignment of Mortgage" which the defendant claimed was copied from its minute book. An expert examiner of questioned documents testified that the alleged additions to the letter were written upon the same typewriter as that used in writing a pleading which had been signed by the defendant and

filed in the quiet title action. He also presented photographs which he said positively show that the photostatic copy of the claimed "Assignment of Mortgage" had been produced by photographing several different writings which were made on the same typewriter as that used for the pleading. As against this evidence there is the testimony of Mrs. McKenna denying the charges against her. The jury decided the issue raised by this direct conflict in the evidence adversely to the defendant and this court is bound by its verdict.

[5] Defendant's argument that the altered and fabricated documents were not material to any of the issues in the consolidated cases goes only to those counts charging her with preparing and offering false evidence. However, an analysis of the pleadings in those cases clearly shows that the two documents were material. In prosecuting the actions brought in the name of her daughter it was the contention of Mrs. McKenna that in 1927, after the filing of the foreclosure suit, Louie S. Dexter had transferred the notes and mortgages to Golden State Holding Company, a corporation, which subsequently conveyed its interest in the property by quitclaim deeds to W. P. Nichols. It was alleged in one of the complaints "that subsequent to the filing of" the foreclosure suit by Louie S. Dexter, "this plaintiff acquired all of the interest and title of the said Louie S. Dexter, in and to the said lands described in said action, and in and to the two said certain notes and mortgages and notes therein described by deeds of conveyances duly recorded * * *, and that the said Louie S. Dexter duly assigned, transferred and conveyed, and this plaintiff has by such conveyances become the owner and entitled to all of the right, title, or interest of said Louie S. Dexter in and to the said notes and mortgages described in the said complaint by conveyances duly made prior to the death of said Louie S. Dexter, and that this defendant H. B. Busing, as administrator of the estate of said Louie S. Dexter, deceased, has no right, title or claim in or to the said notes or mortgages * * *."

The answer of the defendant Busing specifically challenged these allegations. He denied that subsequent to the filing of the foreclosure suit, "the plaintiff, W. P. Nichols, acquired all the interest and title

of the said Louie S. Dexter in and to the lands described in said action and * * * that she acquired any or all interest in two certain notes and mortgages described in said action No. 200705; and they [Busing and another defendant] further allege that whatever deeds are referred to in the complaint on page 1 thereof, were obtained, as these defendants are informed and believe, from divers persons; that the deeds do not describe nor purport to be an assignment of said notes and mortgages, but purport to be quitclaims as to the real estate covered by said mortgages, and were not assignments of said notes and mortgages, and that the said W. P. Nichols acquired no interest in said notes and mortgages by virtue of said deeds". It is apparent from these pleadings that the main point in issue was whether Louie S. Dexter had transferred the notes and mortgages to the Golden State Holding Company. The "Assignment of Mortgage" supported the plaintiff's claim to title and was material evidence upon that issue. Akin to this question is appellant's further claim that by the additions to the letter, the effect of the instrument was not changed in any material way. It is clear that the effect of the letter with the statements concerning transfer of title to the notes and mortgages is much different than it is without those statements. The charge of preparing and offering false evidence in this particular was, therefore, fully sustained, and no error was committed in instructing the jury that the alterations were material.

Also, the ownership of the notes and mortgages is of no consequence so far as the defendant's responsibility for her acts is concerned. Title to these instruments was the question in controversy in the consolidated cases. The jury by its verdicts impliedly found that the defendant manufactured the "Assignment of Mortgage". The instrument was offered in evidence as a basis for the determination of property rights. Conceding that there may have been other evidence that W. P. Nichols owned the notes and mortgages, this fact would not excuse the preparation and offering of forged instruments tending to prove the same title.

[6,7] The defendant also urges that the trial court erroneously excluded a photograph which she offered in evidence, and which it was claimed would show that one of the People's exhibits was not a

correct representation. The exhibit was received in evidence upon proof that it had been made in a certain way. However, the undisputed testimony in connection with the defendant's exemplar established that the paper used in making it was not the same as that used in making the picture introduced in evidence by the district attorney. To be admissible in evidence it must be shown that an exemplar was made under the same conditions as the one which it seeks to disprove. *Sonoma County v. Stofen*, 125 Cal. 32, 57 P. 681; *People v. Halbert*, 78 Cal.App. 598, 248 P. 969; *Western Soil Bacteria Co. v. O'Brien Bros.*, 49 Cal.App. 707, 194 P. 72.

[8,9] Complaint is made that the trial judge allowed the district attorney in cross-examining the defendant's character witnesses to ask them whether their opinion of her reputation for truth, honesty and integrity in the community in which she lives would be changed if they had heard her character questioned because of certain acts done or statements made by her. In the absence of a showing of bad faith it is always within the scope of legitimate cross-examination to ask a character witness whether he has heard the person whose reputation is under investigation accused of conduct inconsistent with the character attributed to him by the witness. *People v. Stevens*, 5 Cal.2d 92, 99, 53 P.2d 133. The court properly allowed the questions asked by the district attorney.

[10] The appellant next contends that prejudicial error was committed by the trial court in admitting into evidence the decree in the consolidated cases in favor of H. B. Busing and against W. P. Nichols, and in allowing it to be read to the jury. No objection to its introduction was made by the appellant, and although the decree was not final, an appeal having been taken from it, this fact was shown as the defendant introduced the notice of appeal therefrom. In any event, it was evidence tending to show that H. B. Busing, who was alleged to have been defrauded, had a valid claim of title to the property and no error was committed by the trial judge in his rulings.

[11,12] The appellant also urges that the court committed prejudicial error in giving certain instructions and in refusing to give others. Complaint is first made of an instruction stating that it is the right of the trial judge or counsel to comment

on the failure of the defendant to explain or deny any evidence against her. No such comment was made and the appellant was not prejudiced by the general statement complained of. Another general instruction defining conduct which amounts to aiding and abetting another in the commission of a crime was a correct statement of the law and was properly given. Under the evidence the jury might have found that the defendant did not personally type the letter or prepare the "Assignment of Mortgage" but that she aided and abetted another in doing so.

[13] The court also instructed the jury that a mortgagor and mortgagee may each have separate and distinct interests in the same property at the same time. Appellant's criticism of this instruction has no merit, for in attacking it she fallaciously assumes that a complete title, by merger, in *W. P. Nichols*, had been proved. However, no such title has been proved and the court did not err in giving the challenged instruction.

[14, 15] In the general charge the jury was instructed that the testimony of a witness is corroborated when it is shown "to comport with some facts otherwise known or established by the evidence". If the word "known" appearing in the transcript is not a typographical error and the instruction was given as it is written, no prejudice resulted from this mistake inasmuch as the jurors were elsewhere clearly charged that they must render their verdict upon the evidence. Nor can the appellant complain of the instructions which assume that she had offered the letter in evidence, for this fact was not denied. In her testimony the defendant admitted that the letter was introduced in evidence by her in the consolidated cases. Another instruction complained of relates to the materiality of the defendant's testimony upon the reopening of the consolidated cases concerning the genuineness of the letter and the "Assignment of Mortgage". As has been stated, each of these instruments was material to the cases on trial when they were offered; hence the instruction was properly given.

[16] All of the numerous instructions offered by the appellant and refused by the court have been examined. Many of these contain erroneous statements of law. Some of them were undoubtedly correct in whole or in part, but these were fully

and fairly covered by the trial judge in other instructions given to the jury, and there is no error in the rulings upon them.

[17] During the trial of the defendant, the Los Angeles newspapers printed reports that certain files of evidence in the chambers of the trial judge and the offices of the district attorney had been "ransacked". Judge Valentine and Deputy District Attorney Fredericks were quoted as saying they were positive some person facing trial had sought to locate and destroy incriminating documents or other evidence. None of the articles mentioned the defendant and the record does not show that any one of them were ever seen by any member of the jury. The defendant has made no showing whatever of any prejudice to her resulting from these publications.

[18] Another of defendant's contentions is that the expert witness who testified on behalf of the People based his opinion that the "Assignment of Mortgage" was forgery upon an examination of the negative of a photograph of it. But this fact does not impeach the opinion. The negative was sufficiently identified, and the witness explained that certain things which cannot be seen on a positive print appear on a negative one because each additional photographic process eliminates a certain amount of detail in the subject photographed.

The appellant's final point is wholly unintelligible. She complains of the exclusion of a certain decree quieting title in a case entitled *Dexter v. Lockwood*, setting forth the decree verbatim in her brief without any references to the transcript and without any showing as to whether it was even offered in evidence. A careful examination of the entire transcript discloses no mention of such a decree. The defendant states in her brief that a motion was made to set the decree aside, but the disposition, if any, of this motion is not given. The only effect of this decree would be further evidence of her daughter's title to the property, and it would not necessarily be a defense to the criminal prosecution.

The judgments and order appealed from are and each of them is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

11 Cal.2d 317

PEOPLE v. DYER.
Cr. 4141.

Supreme Court of California.
May 27, 1938.

1. Witnesses Ⓒ269(4)

In murder prosecution, refusal to permit cross-examination of district attorney as to replies made by defendant when defendant was questioned at night was not error, where district attorney testified in chief only to replies made by defendant in respect to questions asked the defendant on the following day, notwithstanding that some of the questions referred to what defendant had said at night. Code Civ.Proc. § 2048.

2. Witnesses Ⓒ269(2)

In murder prosecution, the state's cross-examination of police officer called as a witness by defendant as to details of conversations had with defendant was not error, where police officer testified in chief as to substance of conversations had with defendant.

3. Criminal law Ⓒ1186(4)

In murder prosecution, questionable rulings as to scope of examination of medical witnesses were not reversible error, where defendant was not prejudiced thereby and there was no miscarriage of justice. Const. art. 6, § 4½.

4. Criminal law Ⓒ388

In prosecution for murder of three girls between six and ten years of age whom defendant lured from a park to a place in the hills where he raped and killed them, testimony respecting the time it took two police officers and two girls of similar sizes and ages to walk from the park to the place in the hills over the same route in the same kind of weather was admissible, although defendant could argue to the jury upon the weight which should be given to such testimony.

5. Criminal law Ⓒ517(1)

The confessions of defendant accused of murder were not inadmissible because of inconsistencies in the details of the events related by defendant, where defendant repeatedly stated in the confessions that he performed the murder.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Albert Dyer was convicted for murder, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Eugene Williams, Deputy Dist. Atty., both of Los Angeles, for the People.

EDMONDS, Justice.

The defendant who was convicted by a jury upon three separate charges of murder in the first degree, has appealed from the judgments subsequently rendered imposing the death penalty upon him.

By an indictment he was charged with the murder of three children between six and ten years of age. On the morning of June 26, 1937, the children went to a park together for play. They were seen there by various persons during the morning and until about noon. When they failed to return to their homes a search was instituted for them, which continued for two days. Their bodies were then discovered in a ravine about four miles from the park.

Practically all of the evidence connecting the defendant with the crime consists of confessions made by him. The first point relied upon for a reversal of the judgments concerns the cross-examination of a witness who testified to these confessions. Other contentions are that the trial judge erred in admitting certain testimony and in limiting the examination of witnesses.

The record shows that the defendant was arrested on July 4th and that he was questioned in the office of the district attorney that evening. On the following morning the district attorney and the sheriff talked with him. On the next day he was taken before the grand jury and examined by the district attorney. At this time, as on the two previous occasions, the defendant confessed that he had committed the crimes with which he was charged.

The record of the proceeding before the grand jury was read in evidence. It shows that in answer to questions then asked of him by District Attorney Fitts the defendant stated in minute detail not only that he had planned some days in advance to murder and ravish the children, but also

how he accomplished his purposes. His story is that of a degenerate fiend. After getting the little girls to leave the park where they were playing on the pretext that he would take them rabbit hunting, he led them to the lonely place in the hills where he carried out his diabolical designs.

Appellant urges that the evidence of his alleged confessions was not admissible, because it was shown that he had been in custody and had been interrogated for a period of ten hours before he made any statements implicating himself in the crime. He did not testify upon the trial and the confessions he made stand uncontradicted. But he claims that he was not allowed to show by cross-examination the circumstances under which he confessed on the night of July 4th.

[1] The district attorney related the conversation he had with the defendant on the morning of July 5th. He stated: "I said to Mr. Dyer that I had been present last evening when questions had been asked him, that I had participated very little in the questioning, but I was just prepared to take from him a statement myself, and before proceeding to take that statement I wanted to say a few things to him. * * * that he had said last evening that he had killed and raped these children; regardless of what he had said last evening, I told him that I wanted him now to tell me the exact situation; if he did not do it then was the time, and we were the people to whom to tell that he had not killed these children; * * * Whereupon Mr. Dyer held his hand up and said, 'Mr. Fitts, before my God I killed them.'" Upon cross-examination the trial judge sustained objections to questions by which the district attorney was asked to relate replies made by the defendant when he was questioned on the night of July 4th. This ruling was correct. Such questions were not within the range of cross-examination. The district attorney testified only to the questions asked the defendant and the answers made by him when he was interrogated the next day. The fact that some of those questions referred to what Dyer had said before did not authorize cross-examination of the district attorney concerning the previous statement or the circumstances under which they were made. Sec. 2048, Code Civ.Proc.; *People v. Amaya*, 134 Cal. 531, 538, 66 P. 794; *People v. Sehorn*, 116 Cal. 503, 510, 48 P. 495; *People v. Cramley*, 23 Cal.App. 340, 138 P. 123; 22 C.J. 633.

[2] The next contention of the defendant relates to the cross-examination of Detective Lieutenant Sanderson, who was called as a witness for the defendant. Lieutenant Sanderson testified that he saw the defendant in the constable's office in Inglewood on the afternoon of July 4th; that he then questioned him and Dyer denied knowing anything about the disappearance of the children. On cross-examination the officer was asked to state the entire conversation which he had with the defendant at that time. The defendant's objection to this question was overruled and the witness thereupon stated the conversation in detail. A similar ruling was made in connection with the cross-examination of the same witness concerning a conversation he had with the defendant at the Hall of Justice later the same day. In response to questions asked by defendant's counsel upon direct examination, the witness was asked when Dyer first stated to him that he had any part in the taking of the children. Lieutenant Sanderson replied that this was about 8 o'clock. Upon cross-examination he was asked to state the conversation in which Dyer admitted his guilt. The defendant's objection to this question was also overruled and the witness was permitted to answer.

The defendant contends that these rulings were erroneous and inconsistent with that made upon the cross-examination of the district attorney. However, the district attorney did not testify as to what had occurred on the previous day when the witness was interrogated. The conversation with the defendant to which he testified included his statement to Dyer that on the previous day Dyer had confessed. This was not testimony of the witness that Dyer had made such statement. But Lieutenant Sanderson was asked on direct examination about two conversations he had with the defendant. Having testified to the substance of the two conversations in reply to these questions, it was proper for the district attorney to ask him on cross-examination to relate the conversations in detail. Sec. 2048, Code Civ.Proc.; *People v. Vukich*, 201 Cal. 290, 257 P. 46.

[3] The defendant complains that the examination of Dr. Glenn Myers, medical witness called by him as an expert, was unduly limited; also, that in rebuttal Dr. De River, a physician who testified on behalf of the prosecution, was allowed to relate, over the defendant's objection, a statement which he said the defendant had made to

him about his sex life. Another point urged by the defendant is that the trial judge improperly overruled his objection to another question put by the prosecution to Dr. De River. These rulings, viewed from a theoretical standpoint, are open to question. But in view of the repeated confessions of the defendant and the corroboration by physical and other evidence of the acts related by him, he was not prejudiced thereby. The entire record clearly shows that there has been no miscarriage of justice; hence the challenged rulings are not a ground for reversal. Art. 6, sec. 4½, Const.

[4] The appellant also claims that the court erred in allowing the prosecution to introduce testimony respecting the time it took two police officers and two little girls, whose ages were approximately the same as the ages of the three children who were murdered, to walk from the park to the place where the crime was committed. The officers testified that they followed the same route described by the defendant in his confession. This was evidence in the nature of an experiment. The ages and comparative sizes of the children were practically the same as those of the murdered children. The same route was followed in the same weather. Conceding that there would probably be some difference between the time taken by the defendant and the three children he enticed from the park to walk to the scene of the crime and that which elapsed when the police officers took two other children over the same route, this was a matter for the consideration of the jury. The defendant might well argue to the jury upon the weight which they should give to such evidence. But it was clearly admissible. *People v. Halbert*, 78 Cal.App. 598, 248 P. 969.

[5] Finally, the defendant contends the trial judge erred in admitting into evidence the confessions of the defendant because they contain so many discrepancies as to wholly discredit their verity. There are a number of inconsistencies in the details of the events related by the defendant on different occasions, but he repeatedly stated that he murdered the children. One cannot read the complete statements which the defendant made without reaching the certain conclusion that the evidence overwhelmingly supports the jury's verdicts.

The judgments are, and each of them is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

I concur in the judgment: HOUSER, J.



11 Cal.2d 412
GEIBEL v. STATE BAR OF CALIFORNIA.*

MORFOOT v. SAME.

SHELLEY v. SAME.

L. A. 16511, 16510, 16502.

Supreme Court of California.

May 25, 1938.

As Modified on Denial of Rehearing
June 23, 1938.

Further Rehearing Denied July 21, 1938.

1. Attorney and client ⇐38

If an attorney admitted to practice in state courts commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy rights and privileges of an attorney in state courts, proceedings may be taken against him in state court.

2. Attorney and client ⇐48

The failure to comply with procedural requirement of state bar requiring approval of president or vice president or a member of board resident in district in which disciplinary proceeding is pending for continuance for longer period than 30 days or for periods aggregating more than 90 days did not render proceeding void nor require dismissal of charges against attorneys, where postponements were due largely to inability or failure of one or other of attorneys or their counsel to be present on date set. Rules of Procedure of State Bar, rule 26.

3. Attorney and client ⇐46

In disciplinary proceedings against attorneys for aiding and abetting unlicensed persons to practice law and in collection of fees for maintaining vexatious and malicious litigation, that attorneys allegedly did not know what sums unlicensed persons were receiving did not exonerate attorneys from dis-

cipline for their conduct which was censurable in other respects.

4. Courts $\Rightarrow$ 282(3)

Under rule that federal jurisdiction must affirmatively appear, the general references to taking of property without due process of law and to unconstitutionality of certain statutes were insufficient to confer jurisdiction on federal court.

5. Attorney and client $\Rightarrow$ 58

Evidence required suspension of attorneys from practice of law for one year and for 90 days, respectively, for having aided and abetted two unlicensed persons to practice law and in collection of fees for maintaining five vexatious and malicious suits in federal court, which suits were dismissed before trial.



In Bank.

Petitions by Martin E. Geibel, Charles R. Morfoot, and Walter Frank Shelley to review recommendations of the State Bar of California suspending the petitioners from practice of law for certain periods for having aided and abetted unlicensed persons to practice law, and for having aided and abetted such persons in collection of fees for maintaining vexatious and malicious litigation.

Petitioners suspended from practice in accordance with recommendations of Board of Governors of the State Bar.

Joseph L. Lewinson and Morris E. Cohn, both of Los Angeles, for petitioner Geibel.

Franklin P. Bull, of Los Angeles, for petitioner Morfoot.

Charles E. McGinnis, of Los Angeles, for petitioner Shelley.

Philbrick McCoy, of Los Angeles, for respondent in all cases.

PER CURIAM.

Petitioners seek a review of recommendations of The State Bar suspending them from practice. The board of governors recommended that Geibel be suspended for three years, and Morfoot and Shelley for one year. The charge against petitioners is that they aided and abetted two unlicensed persons, J. J. Driscoll and Anita Le Bourgeois, to practice law and aided and abetted said persons in the collection of fees for maintaining vexatious and malicious litigation. Each of petitioners had

been admitted to practice for more than twenty-five years.

The amended order to show cause lists five suits alleged to have been maliciously and vexatiously instituted in the United States District Court for the Southern District of California, Central Division, at Los Angeles:

(1) *Elt B. Fowler Estate, Ltd., v. Kneeban et al.*, No. 401-J;

(2) *Elt B. Fowler Estate, Ltd., v. McDuffie et al.*, No. 541-J;

(3) *Fowler and Geibel v. Seymour*, No. 825-Y;

(4) *Holmgreen Estate, Ltd., v. Bank of America et al.*, No. 512-H;

(5) *Gross Estate, Ltd., v. Title Insurance & Trust Co.*, No. 514-J.

These suits were filed between September 18, 1934, and January 30, 1936. All were dismissed before trial.

Petitioners contend that this court lacks jurisdiction to discipline them for the reason that the charges involve their conduct in federal court actions, and the federal court has instituted no proceedings against them. In *Barton v. State Bar*, 213 Cal. 186, 2 P.2d 149, an attorney was suspended for six months for his conduct in a federal bankruptcy proceeding. He did not object to the jurisdiction of the state court to suspend him. The federal court thereafter suspended him for a like period on the record of his suspension by the state court. In *re Barton*, D. C., 54 F.2d 810. In the federal court he contended that the state court lacked jurisdiction to suspend him for his conduct in federal court matters. The federal court held that the record of suspension in the state court did "not intrinsically disclose any such infirmity as would warrant this court in refusing to follow the order of suspension." (Page 811)

[1] If an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. *People v. Green*, 9 Colo. 506, 13 P. 514, 524; *State v. Grover*, 47 Wash. 39, 91 P. 564; *In re Lamb*, 105 App.Div. 462, 94 N.Y.S. 331; *In re Sherwood*, 259 Pa. 254, 103 A. 42, L.R.A.1918D, 447; *Selling v. Radford*, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585,

Ann.Cas.1917D, 569; 5 Am.Jur. 433; 7 C.J. Sec., Attorney and Client, § 18, p. 730.

Petitioners rely on our decision in the case of *In re McCue*, 211 Cal. 57, 293 P. 47. In that case The State Bar opposed the application of McCue, a Montana attorney, to be admitted in this state, on the ground that he had been practicing law in this state without a license since coming from Montana. With regard to McCue's admitted practice in the federal courts in this state, we said that said courts are governed by their own rules of admission, and the state does not place any restrictions upon the persons who may appear before the federal courts within this state. Upon coming to California McCue had been admitted to practice in the Federal District Court, Northern District of California, by virtue of his admission in Montana, in accordance with the rules for admission then in effect in said federal court. His activities in the federal court, therefore, were lawful and did not afford grounds for denying his application to practice in the state courts. Said decision does not support the contention of petitioners herein.

[2] It is further contended that the proceeding herein must be dismissed for a violation of rule 26 of the Rules of Procedure of the State Bar. 213 Cal. cxxviii. Said rule provides as follows: " * * * No continuance shall be for a longer period than thirty (30) days, nor for periods aggregating more than ninety (90) days, without the approval of the president or a vice-president, or a member of the Board resident in the district in which the proceeding is pending." Hearings were held on seven different dates between March 27, 1936, and December 18, 1936. The total period of continuances was approximately 265 days. Continuances between the hearing of March 27, 1936, and the hearing of May 15, 1936, were for 48 days, and the continuances between hearings of May 15, 1936, and October 9, 1936, for 147 days. In only one instance was approval obtained as provided by rule 26. The continuances for all except twenty-one days of the 147-day period were due to petitioner Morfoot's inability to be present on account of a broken leg. A continuance from May 22 to May 29 was due to Geibel's absence, and a continuance from September 25 to October 9, to absence of his attorney in Mexico. In three instances a short continuance was granted because a quorum of the committee was not present on the date set.

It is unfortunate that the hearings extended over so long a period. But the postponements were due largely to inability or failure of one or the other of petitioners, or their counsel, to be present on dates set. Approval of continuances should have been obtained under rule 26. But the failure to comply with this procedural requirement does not render the proceeding void, nor require dismissal of the charges.

The plaintiff in each of the five actions listed in the order to show cause is described as a "benevolent trust estate, organized under citizenship, common law rights of contract, constitution, federal laws and immunities vouchsafed to all persons, as provided in and by the Constitution of the United States of America". These "estates" were described by petitioners as common law or Massachusetts trusts. The instrument creating each of said trusts, except the Holmgreen Estate, Ltd., was drawn by J. J. Driscoll and Anita Le Bourgeois, referred to throughout the proceedings as Madame Le Bourgeois. Said persons were not licensed as attorneys in the state or federal courts in this state. All or some of these declarations of trust, as well as others prepared by Driscoll and Madame Le Bourgeois, were recorded in Arizona. It does not appear that said instruments were entitled to be recorded there. There is no suggestion that the trusts in any case involved Arizona lands. The instruments generally gave as the principal place of business of the trust estate an address which was shown in the proceedings herein to be that of the "All Car Rapid Auto Wash" in Phoenix, Arizona. By arrangement with the owner, cards had been tacked to the wall of a shack on the premises to the effect that the location was the general headquarters of two trust estates other than those listed in the order to show cause. The declaration of trust creating the Holmgreen "benevolent trust" was drawn by petitioner Geibel.

The instruments creating the trusts listed in the charges do not appear in full in the record, but there appears the declaration establishing the Fowler Trust Estate, Ltd. (Not to be confused with the Elt B. Fowler Estate, Ltd.) Since the trust instruments were admittedly similar in important particulars, consideration of the Fowler Estate declaration is important as bearing on the intent and purposes of Driscoll and Madame Le Bourgeois, whose illegal practices petitioners are found to have aided.

Under said instrument, Arch K. Fowler and Maud M. Fowler, "conveyors", transferred their property, real and personal, including their household furnishings, to themselves as trustees, for the benefit of themselves as beneficiaries. The trust was to continue for twenty-one years and automatically renew itself every twenty-one years "during the life and existence of the Constitution of the United States". Upon the death either of Arch Fowler or Maud Fowler, a named relative was to become trustee and beneficiary. The instrument indicates a purpose to place the property of the Fowlers beyond reach of their creditors and to avoid probate upon their deaths.

It does not appear that this trust was involved in litigation. In most instances concerning which there is evidence in the record the trusts were organized with the object of commencing litigation. Trust instruments were recorded in Arizona on the theory that thereby the trust estate would have an existence as a nonresident entity to bring suit in the federal courts in California against California residents. They led some of the laymen with whom they came in contact to believe at first that they were attorneys licensed in this state and, later, that they were licensed to practice elsewhere. After their names in the Los Angeles directory for 1936 appeared the designation "lawyer".

It was the litigation commenced in the name of the Elt B. Fowler Estate, Ltd., which led to the filing of charges against petitioners with The State Bar by Russell B. Seymour, trustee in bankruptcy of the Estate of Frazier McIntosh, and Thomas S. Tobin, attorney for said trustee. Frazier McIntosh, or Seymour, as trustee of his estate, was a defendant in said litigation. Following service on Seymour of an amended complaint in action 541-J, Seymour procured an examination to be held in the bankruptcy matter to ascertain the nature of the claim of the Elt B. Fowler Estate, Ltd., in property to which Frazier McIntosh had asserted ownership. Shortly after said examination, held under section 21a of the Bankruptcy Act (U.S.C.A. sec. 44(a), the complaint was filed against petitioners.

According to petitioners, the purpose of the three suits prosecuted in the name of the Elt B. Fowler Estate, Ltd., was to recover possession of oil lands. Certain stockholders in the Stockholders Petroleum Corporation, Ltd., formerly Deuel Petrole-

um Corporation, purchased at tax sales the interest of the owner-lessor (Amy Kneeben) in lands upon which the Stockholders Petroleum Corporation, Ltd., held an oil lease. The purchase was made in the name of Elt B. Fowler, acting for said stockholders. Thereafter in an action to quiet title brought in the name of Fowler in the superior court of Los Angeles county, judgment was entered holding the tax sales void as to two of the lots for insufficiency in the description in the assessment. The sale of the third lot was held void also on the ground that the assessor improperly included a portion of the lot which had been conveyed to the city of Venice. The judgment quieted title in defendant Amy Kneeben. In a separate judgment previously entered in said action, and not appealed from, it was determined in favor of Amy Kneeben upon her cross-complaint that Frazier McIntosh had no interest in the land.

This state court action was commenced on September 25, 1931. Judgment in favor of Kneeben as against Fowler was entered in October, 1933. Elt B. Fowler died, and the stockholders for whom he was acting were substituted as plaintiffs. Attorney J. B. Joujon-Roche, who had tried the action, took an appeal. No suggestion is made that Mr. Joujon-Roche was in anywise connected with the alleged vexatious and malicious federal court litigation. The District Court of Appeal reversed the judgment of the superior court as to lots 5 and 6, block 6, Silver Strand tract, holding that the tax sale had not been shown to be void. As to the third lot—lot 1, block 6—the judgment was affirmed. *Mallman v. Kneeben*, 11 Cal.App.2d 484, 54 P.2d 46.

If Mrs. Kneeben's title was superior to that of McIntosh, as held in the trial court, and if Mrs. Kneeben had no ground to attack the title of Fowler except that rejected by the District Court of Appeal, then it would seem to follow that Elt B. Fowler, as trustee for the stockholders whom he was representing, had a good title to lots 5 and 6. But it does not appear that any steps were taken in the superior court upon the going down of the remittitur to obtain entry of judgment quieting plaintiff's title either against Kneeben or McIntosh.

While the appeal in the state court action was pending, two of the federal court suits (401-J and 541-J) involving the Fowler tax title were filed. The third federal court action (825-Y) was commenced on January

30, 1936, shortly after the decision on appeal in the state court.

The group of stockholders of the Stockholders Petroleum Corporation, Ltd., for whom Elt B. Fowler had purchased tax titles, had been holding occasional meetings. In the summer of 1934, while the appeal in the state court action was pending, Arch K. Fowler, brother of Elt B. Fowler, introduced J. J. Driscoll and Madame Le Bourgeois to them. At the suggestion of Driscoll and Madame Le Bourgeois, the Elt B. Fowler Trust Estate, Ltd., a "benevolent trust", was created, with A. K. Fowler, Mrs. B. M. Sipes, and petitioner Geibel as trustees. The members of this group of stockholders then transferred their stock to the trust. Although not clearly shown, it is to be inferred that the tax titles to the Silver Strand tract lots were also transferred to the trustees.

Thereafter the three federal court actions were brought by the Elt B. Fowler Estate, Ltd., and the trustees thereof. In action 401-J Geibel appeared as attorney of record on the original complaint and the first amended complaint, and Geibel and petitioner Morfoot as attorneys on the second amended complaint. In action 541-J, petitioner Shelley appeared as attorney on the original complaint, petitioner Morfoot on the amended complaint. Petitioner Geibel appeared as attorney of record in the last action, 825-Y.

The complaint in action 401-J prays for a decree quieting title and for restitution of possession of real and personal property, for an accounting of the proceeds of two oil wells on certain lots, and for "liquidated" damages in the sum of \$25,000,000 against 145 defendants, including the attorney-general of the state of California, the corporation commissioner, a number of the major oil companies, and four Los Angeles banks. It is also asked that the plaintiffs themselves be appointed receiver of the property pending trial.

The first amended complaint reduced the number of defendants to 113, while the second amended complaint named 38 defendants. The defendants include persons who were defendants in the state court action and others. The amended complaints made only minor changes in the original. The action related to the Silver Strand tract lots which were the subject of the appeal pending in the state District Court of Appeal and also to numerous "oil and gas lease rights" in Los Angeles, Santa Barbara and

Orange county lands. It is to be inferred that the Elt B. Fowler Estate, Ltd., had succeeded to whatever title Elt B. Fowler had by virtue of his purchase of the Silver Strand tract lots at the tax sale for the benefit of approximately twenty of the stockholders of the Stockholders Petroleum Corporation. But as between the Elt B. Fowler trust estate, on the one hand, and the Stockholders Petroleum Corporation, Ltd., on the other, the "oil and gas lease rights" were the property of the Stockholders Petroleum Corporation". Geibel admitted that they had never been transferred to the Elt B. Fowler Estate, Ltd.

The committee found that said complaint was a "hodge-podge of irrelevant and meaningless expressions" and in part "incoherent and unintelligible". It alleges that the defendants are illegally holding possession of real and personal property of plaintiffs, "in violation of the constitutional citizenship and property rights of the complainants herein, without due process of law", and that "defendants and each of them, have and are continually violating the constitutional citizenship and property rights, and also the constitutional privileges and immunities of the complainants herein, without due process of law. * * *" Charges of fraud are made without any indication of the nature of the fraud. The complaint refers to the action in the state court, then pending on appeal in the state District Court of Appeal, with the statement that the superior court of Los Angeles county had unconstitutionally set aside tax deeds.

The memorandum of points and authorities is a mass of generalities, including extensive quotation from the Constitution of the United States, and citation of such land marks of constitutional law as *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, and *Munn v. Illinois*, 94 U.S. 113, 134, 24 L. Ed. 77. Petitioner Geibel's name appears as attorney of record on the original complaint and the first amended complaint, while Geibel and Morfoot appear on the second amended complaint.

After the filing of the complaint and first amended complaint in action 401-J, action 541-J was filed in the federal court with petitioner Shelley as attorney of record on the original complaint, and petitioner Morfoot on the amended complaint. The committee found this complaint also to be a hodge-podge of meaningless expressions. It sought relief similar to that prayed for in action 401-J, with reference to the Silver

Strand tract lot. It likewise prayed for damages in the sum of \$25,000,000. The reason for filing a second action does not appear.

Action 401-J was dismissed by order of Judge James on motions filed by Russell B. Seymour, trustee in bankruptcy of the estate of Frazier McIntosh, and by others. Attorneys Geibel and Morfoot were both present at the hearing of the motion. Action 541-J was also dismissed by Judge James.

On January 30, 1936, the third Fowler quiet title suit was filed in the federal court. It also related to the Silver Strand tract lots. Petitioner Geibel appeared as attorney of record on this complaint. A motion to dismiss was heard by Judge Yankwich and granted. On the same date on which he filed the third quiet title suit, Geibel filed a motion to set aside the dismissal in action 401-J, without any notice of hearing thereon. Seymour caused the motion to be placed on the calendar for February 17, 1936. Geibel procured a continuance. Thereafter he filed an affidavit for a further continuance on the ground that he "had not had time to make the proper service on the other defendants other than the defendants that set the motion for hearing". However, there was already on file an affidavit of Geibel's secretary to the effect that acting under the direction of Geibel she had served duplicate copies of the petition to vacate the dismissal upon all the attorneys representing the defendants. The motion to vacate the dismissal was denied.

In addition to the above litigation in which the Elt B. Fowler Trust Estate, Ltd., was plaintiff, the committee made findings with reference to two other federal court actions listed in the order to show cause—Holmgreen Estate, Ltd., v. Bank of America, 512-H, and Gross Estate, Ltd., v. Title Insurance & Trust Co., 514-J. Geibel appeared as attorney of record in the Holmgreen case, while Shelley appeared as attorney on the complaint filed in the Gross case. Morfoot was substituted for Shelley, and later Geibel was substituted for Morfoot.

It also appeared from the evidence that four other actions besides those listed in the order to show cause were filed in the federal court with a benevolent trust estate, or the trustees thereof, as plaintiffs. Shelley filed the complaints in three of these

other actions. The fourth was filed by one Jaynes *in propria persona* on stationery of "Morfoot and Sutton".

The committee found that complaints in each of the five actions listed in the order to show cause were filed by one or the other of petitioners "in collaboration" with Driscoll and Madame LeBourgeois, unlicensed persons. The evidence sustains the finding as to four of the actions. In the fifth, the Holmgreen case, Geibel testified that he drew the instrument creating the benevolent trust for a client of his who did not come to him through Driscoll or Madame LeBourgeois, and that he acted entirely without their collaboration. The conclusion is inescapable that the complaints in the other four cases and the memorandum of points and authorities which accompanied them were prepared by Driscoll and Madame LeBourgeois and signed by one of petitioners for filing. It is contended that the work done by said unlicensed persons in connection with the case is analogous to that which may be done lawfully by an unlicensed law clerk. We cannot accede to this contention. Driscoll and Madame LeBourgeois performed services of a legal nature as principal actors, rather than in a subservient position under licensed attorneys.

Petitioner Geibel testified that he filed the original complaint in action 401-J, one of the three Fowler suits, under the impression that petitioner Shelley had prepared it; that "he took it for granted that Shelley knew how to prepare a pleading", and for that reason he did not go over the complaint in detail. The most cursory reading of said complaint would reveal its insufficiencies. Shelley denied that he had prepared said complaint. Furthermore, Geibel thereafter filed the amended complaint in said action, and with petitioner Morfoot filed the second amended complaint, which differs from the original only in minor respects. He also filed the complaint in action 825-Y, and the motion to vacate the dismissal in action 401-J, and took an active part in court appearances in said actions.

The position of Geibel is anomalous. He was vice-president and legal advisor of the Stockholders Petroleum Corporation, Ltd., which held leases on the Silver Strand tract lots and other property. A minority of the stockholders of said corporation purchased the interest of the owner-lessor in the Silver Strand tract lots at tax sale

in the name of Elt B. Fowler. The delinquent taxes for which the property was sold were a lien thereon before execution of the leases held by the corporation. A valid tax sale would, therefore, pass title to the purchaser free and clear of the subsequent lease in the usual case. The Stockholders Petroleum Corporation, Ltd., was a defendant in the state court action brought by Elt B. Fowler to quiet his title against the claim of said corporation and other defendants. Said corporation was also a party defendant in action 401-J in the federal court. Geibel, vice-president and legal advisor of the corporation, became one of the trustees of the Elt B. Fowler Trust Estate, Ltd., formed by this minority group of stockholders, and as attorney of record for this trust estate, he filed the action against the Stockholders Petroleum Corporation, Ltd., of which he was vice-president and legal advisor. He contends that the interests of the minority group were not adverse to that of the corporation, apparently for the reason that the minority group, if successful in recovering possession of the oil lands, intended to recognize the lease rights of the corporation, according to Geibel. But that the interests were adverse was recognized by Geibel himself, for he testified that he refused to sign the contracts by which Driscoll and Madame LeBourgeois were employed as managers of the trust estate for the reason that he represented the corporation as vice-president and legal advisor.

[3] The committee found that petitioners aided and abetted Driscoll and Madame LeBourgeois "in the collection of fees for maintaining vexatious and malicious litigation". Petitioners object that there is no evidence that any fees for legal services were paid to said unlicensed persons. They had agreed that the sum of \$200 a month provided for in the contract employing them as managers should not be paid to them until the property was recovered and income producing. But, under the guise of needing funds for expenses of the litigation, including funds with which to pay the attorneys of record, they received from the Fowler Trust Estate, Ltd., more than \$4,000, raised through voluntary contributions, and retained a large part of said sum. The demands for expense money were frequent and insistent. Petitioner Geibel claims that he did not receive any fees for his services, while Shelley and

Morfoot received only small sums. The only reasonable inference is that Driscoll and Madame LeBourgeois were collecting and retaining funds. The fact that petitioners may not have known what sums Driscoll and Madame LeBourgeois were receiving does not exonerate them from discipline for their conduct, which was censurable in other respects.

Petitioners Shelley and Morfoot had no connection with the affairs of the Stockholders Petroleum Corporation, Ltd., nor with the Elt B. Fowler Estate, Ltd., until they were requested by Driscoll to act as attorneys of record in suits brought by the estate. Shelly withdrew from the litigation upon the suggestion of Judge James of the federal court, who informed Shelley, according to Shelley's testimony, that he did not like the appearance of these cases brought by "benevolent trust estates". Shelley further testified that he was under the impression that Madame LeBourgeois and Driscoll were attorneys. His testimony in this respect is unconvincing. Petitioner Morfoot was not the original attorney in any of the cases. He claims to have accepted substitutions in reliance on the integrity and ability of the attorneys by whom the actions were originally filed.

Petitioners attack the finding that the federal court actions were "baseless" and "maliciously and vexatiously brought". They point to the fact that the District Court of Appeal, in *Mallman v. Kneeben*, supra, reversed the judgment of the trial court against the members of the Forafter group, as to lots 5 and 6, block 6, of the Silver Strand tract. Action 401-J concerns rights of the Fowler Estate in a number of other properties not involved in the state court action, as to which there is no evidence whatsoever of any bona fide claim in said trust estate. The Stockholders Petroleum Corporation held or had held leases on certain of the properties, which admittedly had never been transferred to the trust estate, in which said estate had no interest whatsoever. In fact, Geibel, as attorney of record, subsequently brought an action on behalf of the Stockholders Petroleum Corporation to establish its interest in said lands.

[4] The complaints failed to state grounds of jurisdiction in the federal courts. Diversity of citizenship does not appear. There is no suggestion that the

trustees of the trust resided elsewhere than in California. Nor is there a sufficient statement of any federal constitutional question. The complaint contains general references to the taking of property without due process of law and to unconstitutionality of certain statutes. But, under the rule that federal jurisdiction must affirmatively appear, the general references are entirely insufficient.

As to the Fowler suits, the chief purpose would seem to have been to adjudicate conflicting claims of the Fowler Estate and Frazier McIntosh and the trustee in bankruptcy of his estate. The judgment of the District Court of Appeal in the state court actions indicates a bona fide claim in the trust estate as to certain of the Silver Strand tract lots. But the nature of the controversy between the trust estate and McIntosh does not appear; nor does it appear that said controversy, whatever its nature, involved a federal question.

[5] The findings emphasize the harassing effect of the actions on the defendants therein. The actions were objectionable from another point of view. The evidence indicates that the members of the Fowler group were simple laymen in humble circumstances. That they believed in good faith that a fraud had been perpetrated on them is apparent. They made repeated contributions demanded by Driscoll and LeBourgeois, supposedly to finance the litigation. Those who could not give more made contributions as low as \$1. Mrs. Sepis, one of the trustees, and her husband, paid in more than \$3,000, partly borrowed. Doubts raised in the minds of members of the group by the repeated dismissals of actions were quieted with the assurance by Driscoll and Madame LeBourgeois that the final outcome would be successful. Petitioner Geibel attended a number of meetings of the group, at which Driscoll and LeBourgeois gave purported explanations of what was being accomplished. Any merits which claims of the trust estate may have had as to any of the lands have been prejudiced by this unfortunate litigation.

It is ordered that the petitioner, Martin E. Geibel, be and he hereby is suspended from the practice of the law in this state for a period of one year; and that the petitioners, Charles R. Morfoot and Walter

Frank Shelley, be and each of them is hereby suspended from the practice of the law in this state for a period of ninety days, effective thirty days from the filing of this order.



11 Cal.2d 343

**HART et al. v. CITY OF BEVERLY
HILLS et al.**
L. A. 16443.

Supreme Court of California.
May 31, 1938.

Rehearing Denied June 30, 1938.

1. Constitutional law ⇨277(1)

The constitutional rights of individuals to acquire and to possess property include the right to dispose of it ordinarily in such manner as he may see fit to do so, and no statutory restriction upon such personal liberty is permissible except that exercise of police power may be invoked in derogation thereof when it is founded upon valid and substantial considerations relative to health, morals, safety, or general welfare of the public. Const. Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

2. Constitutional law ⇨81

The words "general welfare," which have been grafted upon original words "health, morals and safety" within rule validating legislation which has a substantial relation to public health, safety, morals, or general welfare, must be interpreted in accord with rule that, when words of a general character follow those of special meaning, former must be governed in their significance by that which inheres in the latter. Civ. Code, § 3534; Const. Cal. art. 1, § 13.

[Ed. Note.—For other definitions of "General Welfare," see Words & Phrases.]

3. Statutes ⇨194

In construction of a statute, special words employed therein are the guiding if

not the controlling force as regards general and succeeding words. Civ.Code, § 3534.

right of disposition. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

4. Constitutional law ☞81

The inclusion of words "general welfare" as an element either essential or which may be relied upon as affording a justification for that which otherwise properly might be termed a violation of personal rights of individual has effect only of enlarging or extending significance that formerly was deemed properly attachable to grounds originally deemed necessary to expedient exercise of police power of the state. Civ.Code, § 3534; Const.Cal. art. 1, § 13.

5. Statutes ☞212

A statute having been enacted, presumption will be indulged not only that it was inspired by general intention to add needed protection to health, morals, or safety of the public, but that statute would be corrective of some specific if not specified evil. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

6. Constitutional law ☞48

Unless questioned legislation bears unmistakable imprint of arbitrary or oppressive action on part of legislators, or some characteristic inducement closely akin thereto, statute must be deemed to have been enacted in accordance with implied powers of legislative body and every intendment will be indulged in favor of validity of such legislation.

7. Evidence ☞5(2)

It is common knowledge of which a reviewing tribunal may take judicial notice that city of Beverly Hills is the place of residence of numerous "stars" and "executives" of the motion picture industry.

8. Auctions and auctioneers ☞2

An ordinance of city of Beverly Hills forbidding conduct of auction sales within residential district was justifiable on assumption that ordinance would tend to promote safety of general public not only from standpoint of protection of its members from physical injury but also from possibility of their being the victims of fraud or crime.

9. Constitutional law ☞296(2)

An ordinance of city of Beverly Hills forbidding conduct of auction sales within residential district was not unconstitutional as depriving a citizen of his property without due process in depriving citizen of his right to dispose of his property, since ordinance in effect was merely regulative of

10. Constitutional law ☞253

Although a legislative body cannot destroy a given constitutional right, it has authority to regulate its exercise. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Petition by Lewis S. Hart and another for a writ of mandate directed to the City of Beverly Hills and others to issue to petitioners a license to sell certain personalty at auction or to show cause why they should not do so wherein respondents filed a demurrer. From a judgment for respondents after sustaining their demurrer, petitioners appeal.

Affirmed.

For prior opinion, see 73 P.2d 1227.

Desser & Rau, Michael I. Nessen, and Milton N. Sherman, all of Los Angeles (Jack L. Rau, of Los Angeles, of counsel), for appellants.

Richard C. Waltz, City Atty., and C. Richard Maddox, Asst. City Atty., both of Beverly Hills, for respondents.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, amici curiae.

HOUSER, Justice.

From the record herein, it appears that by the terms of a zoning ordinance, a specified portion of the City of Beverly Hills is set apart as a residential district. In substance, by the terms of a separate ordinance of said city it is provided that no auction sale of personal property shall be held in such an area, but that "all auction sales except for the sale of real property are required to be held in the retail business district, * * *." It further appears that Andrew Rice maintains his home in a residential district of said city; that at a time after said last-mentioned ordinance became effective and was in force, he employed one Lewis S. Hart to conduct at said residence an auction sale of certain household goods of which Rice was then the owner,—in pursuance of which Hart made application to the said city for a license to conduct said auction sale at the home of said Rice, and there-

upon, in proposed payment thereof, tendered to the said city the sum of \$10 which was the appropriate fee for that privilege, in accordance with the requirements of the said ordinance. The said city refused to accept the fee so tendered, or to issue to said Hart a license for which he had thus applied. Thereupon, on the application of the said Rice and Hart, an alternative writ of mandate was issued out of the superior court in and for the county of Los Angeles, by which the respondent city and its proper officials were required either to issue to the said petitioners a license to sell the aforementioned personal property at auction, or on a date specified, to show cause why they should not do so. A general demurrer to the application for the writ which was interposed by the said defendants was sustained "without leave to amend". It is from the ensuing judgment that the instant appeal has been presented to this court.

Appellants contend that the ordinance is unconstitutional in that it is in violation of the guaranties of their personal rights which are expressly conferred upon them both by the provisions that are contained in section 13 of article 1 of the state Constitution, and in the Fourteenth Amendment to the Constitution of the United States, in that the effect of the ordinance is to deprive them of their property "without due process of law".

[1] By judicial determination, evidenced by many legal precedents, the principle of law is thoroughly established that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it,—ordinarily in such innocent manner as he may see fit to do so, and that no statutory restriction upon such personal liberty is permissible, excepting only in that regard, that the exercise of the police power may be invoked in derogation thereof when it is founded upon valid and substantial considerations relative to the health, the morals, the safety or the "general welfare" of the public. *Ex parte Quarg*, 149 Cal. 79, 84 P. 766, 5 L.R.A.,N.S., 183, 117 Am. St.Rep. 115, 9 Ann.Cas. 747; 8 Cyc., p. 886; *People v. Davenport*, 21 Cal.App.2d 292, 296, 69 P.2d 862; *Roystone Co. v. Darling*, 171 Cal. 526, 532, 154 P. 15; 12 C.J., p. 945, 946; 5 Cal.Jur., p. 728, 729; *People v. Pace*, 73 Cal.App. 548, 238 P. 1089; *People v. Bosse*, 21 Cal.App.2d

276, 68 P.2d 990; *Ex parte Yun Quong*, 159 Cal. 508, 511, 114 P. 835, Ann.Cas. 1912C, 969.

But it is not with reference either to the expression of principles of the law, or to a desire to jealously safeguard human liberties, that the respective parties to the instant controversy are at issue. Each of the representatives of the parties to this proceeding is learned in his profession, and each vies with the other in the extent or the proportion of his devotion to protection from encroachment by legislative enactment upon the constitutional personal rights of the individual. In the abstract, the line of demarkation between the respective parties is indicated merely by a difference in opinion with respect to the proper application of the constitutional guaranty to the facts before this tribunal. More particularly, on the one hand, the discussion relates to a consideration of the question of the limitations that properly should attach to the exercise of the police power, as judicially construed to embrace statutes enacted in the interest of health, morals, safety, or the "general welfare" of the public; and on the other, to a reflection concerning the apparently increasing tendency to expand and to accord the utmost elasticity to the power to legislate on a subject where either the avowed or the implied purpose is to promote the well-being of humanity; and as an incidental and possible consequence regarding the latter situation, it is asserted that, pursuant to such tendency and on suitable occasion, not only may constitutional guaranties be distorted beyond recognition of their original intent and purpose, but if deemed advisable or expedient by such legislative bodies, they may be utterly disregarded. Covering a period of decades, the exercise of the police power was limited to conditions wherein either the health, the morals, or the safety of the general public was seriously and unquestionably involved. As long as any or either of such requirements were or was respectively maintained, personal liberties were not seriously endangered,—but not so, necessarily, upon the advent of the addition of the element of "general welfare" to those constituents which theretofore solely had constituted a justifiable excuse or warranty for the destruction of natural rights. It is obvious that in its liberal and untrammelled construction, "general welfare" has an infinite range,—nearly, if not as completely beyond the con-

templation of the human mind as is the universe itself. At least, it is so inclusive that to ordinary intelligence, its scope is all-embracing and impossible of limitation. In its simplicity, it knows no bounds; it is as changeful as the "vagrant breeze." That which to one generation might appear to be most promising of the public good, by the succeeding might be denounced as so harmful as to constitute a public menace.

Thus, if the meaning of the words "general welfare" be accorded their utmost significance, the original "due process" protector of human rights may be so endangered by the attacks made thereon by the "police power" destroyer that, considering present legislative tendencies, within the lives of those now in being, if utter annihilation of the substance of constitutional guaranties do not ensue, no more than a shadow ultimately may remain.

[2-6] In actual practice, and in the first instance, the necessary determination of the substantial effect resulting from legislation to be enacted under the guise of the police power, with reference to the "general welfare" of the public, theoretically confided to the sound judgment of a wise and capable legislative body, in reality and eventually, may reside either in scheming and corrupt politicians, or in a careless or a fanatical constituency, with the consequence that the public good may become "the mob's football". But such results may ensue only in the absence of conservative and conscientious judicial construction and interpretation of legislative acts. As hereinbefore has been indicated, it should be noted that the words "general welfare" have been grafted upon the original stock of "health, morals and safety", with the resulting incident that they must be interpreted in accord with the rule that requires that when words of a general character follow those of special meaning the former must be governed in their significance by that which inheres in the latter. Otherwise stated, in the construction of a statute, special words employed therein are the guiding, if not the controlling force as regards general and succeeding words. Sec. 3534, Civ.Code; *Hunt v. Manning*, 24 Cal.App. 44, 140 P. 39; *In re Johnson*, 167 Cal. 142, 138 P. 740; *In re Flesher*, 81 Cal.App. 128, 252 P. 1057; *Pasadena Univ. v. Los Angeles County*, 190 Cal. 786, 214 P. 868; *Coleman v. City of Oakland*, 110 Cal.App. 715, 295 P. 59;

People v. McKean, 76 Cal.App. 114, 243 P. 898; *Fisher v. Los Angeles Pac. Co.*, 21 Cal.App. 677, 132 P. 767; 23 Cal.Jur., p. 755, 756; *In re Marquez*, 3 Cal.2d 625, 629, 45 P.2d 342. With such reversion to legal principles of statutory construction, their application to the instant situation must result in the conclusion that the inclusion of the words "general welfare" as an element either essential, or which may be relied upon as affording a justification for that which otherwise properly might be termed a violation of the personal rights of the individual, has the effect only of enlarging or expanding the significance that formerly was deemed properly attachable to the grounds originally deemed necessary to the expedient exercise of the police power of the state. In such a light, were it not for that which by eminent authority repeatedly has been shed in similar situations, it might be deemed appropriate meticulously to inquire into, and to determine as accurately as practicable, the "metes and bounds" of the words "health, morals and safety", as modified and perhaps liberalized by the additional words "general welfare" when applied to legislation initiated and enacted with the express or the implied intention of exercising the police power of the state in derogation of individual, vested and personal rights guaranteed by constitutional provision. In that regard, the formulated rule seems well established, in substance, that a statute having been enacted, the presumption will be indulged not only that it was inspired by a general intention to add needed protection to the health, morals, or safety of the public, but that the statute would be corrective of some specific, if not specified evil;—from which significant, if not controlling influence, has been evolved the additional principle that unless the questioned legislation bears the unmistakable imprint of arbitrary or oppressive action on the part of the legislators, or some characteristic inducement closely akin thereto, the statute must be deemed to have been enacted in accordance with the implied powers of the legislative body. In other words, no presumption of invalidity of the statute will obtain; but to the contrary, every intendment will be indulged in favor of its validity. 23 Cal.Jur. 783; 5 Cal.Jur. 628; *Rainey v. Michel*, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148; *Cuthbert v. Woodman*, 185 Cal. 43, 195 P. 673; *People v. Hayne*, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348,

17 Am.St.Rep. 211; *Galeener v. Honeycutt*, 173 Cal. 100, 103, 159 P. 595; *E. Clemens Horst Co. v. Industrial Acc. Comm.*, 184 Cal. 180, 193, 193 P. 105, 16 A.L.R. 611; *In re Makings*, 78 Cal.App. 58, 247 P. 923; *In re Spencer*, 149 Cal. 396, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105, and *Title, etc., Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356, 8 L.R.A.,N.S., 682, 119 Am.St.Rep. 199.

In the application to the instant situation of such thoroughly recognized legal principles, and in the absence of any showing on the part of the appellants that in the adoption of the questioned ordinance there obtained or was present any semblance of conditions of that adverse and deleterious character to which reference hereinbefore has been had, inevitably the validity of the ordinance should be adjudged.

[7,8] But apart and aside from implied legal inducement for the adoption of the ordinance, the questioned action of the legislative body may be entirely justified on the assumption that as a matter of fact it was in response to a laudable suggestion that it would tend not only to the greater safety of the general public, not only from a standpoint of protection of its members from physical injury, but also from the possibility of their being the individual victims of fraud or crime. It is common knowledge of which a reviewing tribunal may take judicial notice, that the City of Beverly Hills is the place of residence of numerous "stars" and "executives" of the motion picture industry. Ordinarily, a well-advertised auction sale of personal property will attract a motley throng, not only of possibly intending purchasers, but also of the curious and of idle and unemployable persons. Where great crowds are gathered, with the prevailing necessary incident of automobile transportation, accidents are almost inevitable, with usual resulting injury to persons and to property. Furthermore, with regard to a sale at auction in said city, of the personal effects of persons who are well known to the public, among whom may be "stars" of the motion picture profession, it is asserted that heretofore, by unscrupulous persons in charge of such a sale, upon occasion, articles of merchandise from retail establishments have been intermingled with the personal effects of the owner thereof, and thereupon have been represented to the purchasing public

and offered for sale as, the personal property of the "star" or other well-known person whose effects were the subject of such auction sale. An implied fraud may thus have resulted to an enthusiastic bidder, who in his admiration perhaps, for the person whose property presumably was being sold, may have been induced to pay much more for a given article than its real or its sentimental value warranted. With regard to such a situation, in the case of *Cofman v. Ousterhous, Dairy Com'r*, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219, it was said (page 828): "The police power of the state is not limited to the regulations necessary 'for the preservation of good order or the public health or safety. The prevention of fraud and deceit, cheating and imposition, is equally within the power, and a state may prescribe all such regulations as in its judgment will secure, or tend to secure, the people against the consequences of fraud'". An opportunity also is presented for operation by the pilferer, the pickpocket or even the "finger man". It therefore is readily conceivable that the ordinance of which complaint here is registered, resulted from an honest and praiseworthy effort on the part of the legislative body of the City of Beverly Hills to faithfully perform its official duty and better to insure the safety of its residents and the "sojourners within its gates".

[9-10] But the validity of the ordinance need not be made to rest solely upon such grounds. Considering its language, the ordinance is not, nor does it purport to be, either destructive or confiscatory of the rights of the appellants. No inhibition may there be discovered regarding the right of the owner of the personal property to sell or "to dispose" of it. In effect, the ordinance is merely regulative of that right, in that it ordains that no auction sale of such personal property shall take place within a specified area of said city. The manner, together with the place of sale only are prescribed; the ultimate and controlling right of disposition remains wholly unaffected. In addition to the case of *Cofman v. Ousterhous, Dairy Com'r*, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219, the legal precedents are legion which, although denying the power to a legislative body to destroy a given constitutional right, nevertheless accord full recognition to the authority to regulate its exercise. *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; *Quong*

Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 37, 192 P. 1021, 12 A.L.R. 1190; Gregory v. Hecke, 73 Cal.App. 268, 277, 278, 238 P. 787; In re Stoltenberg, 21 Cal.App. 722, 132 P. 841; Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488; 5 Cal.Jur., p. 704, 705; Greenberg v. Western Turf Ass'n, 148 Cal. 126, 82 P. 684, 113 Am.St.Rep. 216; Matter of Application of Barmore, 174 Cal. 286, 163 P. 50, L.R.A.1917D, 688.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.

We concur in the judgment: EDMONDS, J.; LANGDON, J.



11 Cal.2d 322

WACHS v. WACHS.
S.F. 15937.

Supreme Court of California.
May 27, 1938.

1. Appeal and error ⇨1008(3)

Where question is whether uncertainty or ambiguity exists in contract is one of law, lower court's findings on issue are not binding on appeal.

2. Evidence ⇨455

Where contract for dissolution of real estate partnership provided for payment of commissions when any transaction leading to a commission was closed as to certain person named in schedule and word "transaction" may have implied something more than sale, lease, or contract, parol evidence was admissible to aid in the interpretation of the contract.

The word "transaction" embraces within its meaning the doing or performing of any business or negotiation, or negotiations affecting property rights, contracts, agreements, and the negotiations resulting in contracts and agreements and in transfer of titles.

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

3. Evidence ⇨458

Where words of a contract consistently admit of two interpretations, according to subject matter in contemplation of parties, parol evidence may be admitted to show circumstances under which contract was made and subject matter to which parties referred. Civ.Code, § 1647; Code Civ.Proc. § 1860.

4. Evidence ⇨458

In action on contract of dissolution of real estate partnership for share of commissions under provision of contract providing for payment of commissions, when any transaction leading to commission was closed as to any person on certain schedule, meaning of word "transaction" made contract susceptible of various interpretations, and trial court should have permitted plaintiff to plead and prove surrounding circumstances for purpose of aiding court in interpreting contract and not for purpose of varying terms of contract. Civ.Code, § 1647; Code Civ.Proc. § 1860.

In Bank.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Action on contract for commission due under contract for dissolution of partnership by Harold Wachs against Lionel Wachs. Judgment for defendant, and plaintiff appeals.

Reversed.

Prior opinion, 71 P.2d 323.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

PER CURIAM.

A hearing of the instant appeal by this court after decision thereon by the District Court of Appeal has resulted in the conclusion that the decision that was rendered by the latter court is correct. The opinion therein, which was prepared by Mr. Justice Spence, is therefore adopted as the opinion of this court. It is as follows, 71 P.2d 323:

"Plaintiff brought this action upon a contract seeking to recover a share of certain commissions claimed to be due him under the terms of said contract. From a judgment in favor of defendant, plaintiff appeals.

"For approximately ten years prior to October 1, 1931, plaintiff and defendant had engaged in the real estate business as co-partners under the name of 'Wachs Bros.' A dissolution agreement was entered into as of that date. There was a paragraph in said agreement entitled 'Good Will' which read in part as follows:

"It is contended by Harold Wachs that there is a good will which appertains to the partnership and that upon the dissolution thereof compensation should be made to Harold Wachs by Lionel Wachs. Attached hereto is a list called schedule 10 of the persons with whom Wachs Bros. have been in contact during the life of the partnership and to whom maps, letters and other literature have been sent. * * * Lionel Wachs hereby agrees to pay to Harold Wachs out of the commissions earned from any transactions consummated on or before October 1, 1934, a sum not to exceed \$2,500, which sum shall be payable as follows: When any transaction leading to a commission is closed as to any persons on said Schedule 10 * * * Lionel Wachs agrees to pay 25% thereof to Harold Wachs, within thirty days after the receipt thereof, until the sum of \$2,500 has been paid."

"In his complaint, plaintiff alleged among other things 'That the persons listed on said Schedule 10, by reason of their ownership of property, or interests in property, or their contacts with owners of property, or owner of interest in property, were persons with or through whom future patronage was anticipated by said partnership'. These allegations of the complaint were stricken out upon motion of defendant.

"On the trial plaintiff made an offer of proof to which an objection was sustained by the trial court. It appeared that approximately 200 persons were named on said schedule 10. It was stated in the contract that said schedule contained a list of '*the persons with whom Wachs Bros. have been in contact during the life of the partnership*'. (Italics ours.) A perusal of the list shows that, with four or five exceptions, it was made up entirely of the names of natural persons rather than of corporations or partnerships. The addresses of said persons were listed, which addresses in numerous cases were listed as in care of some bank, investment company, chain store corporation or other commercial institution. These companies were not otherwise listed on said schedule 10. Plaintiff's offer was made in great detail but it may be briefly summariz-

ed. He offered to prove that approximately 50 persons named on said list were either officers, agents or employees of certain principals such as banks, investment companies, chain store corporations or other commercial institutions, and that said persons had acted for and on behalf of their respective principals in dealing with the partnership as real estate brokers prior to the dissolution; that the partnership had never had any transactions with said 50 persons in their individual capacities but had had numerous transactions with them in their respective representative capacities, which transactions had resulted in the payment of commissions to the partnership. It was stated that said offer of proof was made to show the capacities in which said persons had acted in dealing with partnership prior to its dissolution and to place before the trial court the circumstances surrounding the making of the contract in order to enable the trial court to determine the meaning of the words 'When any transaction leading to a commission is closed as to any persons on said Schedule 10' as used in said contract. It was stipulated by the parties that after the dissolution and between October 1, 1931, and October 1, 1934, transactions were had with certain persons named in said offer of proof and in said schedule 10 in their representative capacities and on behalf of their said principals, and that said transactions resulted in net commissions paid to defendant Lionel Wachs in a sum in excess of \$8,000. This action was brought to recover a portion of said last-mentioned commissions.

"Appellant contends that the trial court erred in granting the motion to strike and in sustaining the objection to the offer of proof and therefore the judgment should be reversed. In our opinion this contention must be sustained.

[1] "The parties agree upon the general principles of law applicable in determining the admissibility of parol evidence in connection with written contracts but they disagree upon the question of whether such evidence was admissible here. It is conceded that the question involved is whether the language 'When any transaction leading to a commission is closed as to any person on said Schedule 10', as used in said contract, is clear and explicit or whether said language involves such an uncertainty as to permit the introduction of parol evidence in aid of the interpretation thereof. It is further conceded that 'the question whether an

uncertainty or ambiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal'. (Brant v. Calif. Dairies, Inc., 4 Cal.2d 128, 133, 48 P. 2d 13.) We are of the opinion that owing to the various senses in which the word 'transaction' may be used, such an uncertainty existed in the language employed in the contract here as to permit the introduction of the parol evidence offered.

[2] "The word 'transaction' may imply something more than sale, lease or contract as used in the contract before us. It has been stated that said word embraces within its meaning 'the doing or performing of any business' (2 Bouv. Law Dict., Rawle's Third Revision, p. 3307); 'negotiation' (United States v. Pan-American Petroleum Co., 9 Cir., 55 F.2d 753); 'negotiations affecting property rights, contracts, agreements, and the negotiations resulting in contracts and agreements and in the transfer of titles'. (Tanner v. State, 161 Ga. 193, 130 S.E. 64.) Other definitions may be found in the authorities of which we need cite but a few. (Stephens v. Short, 41 Wyo. 324, 285 P. 797; Bright v. Virginia, etc., Co., 9 Cir., 270 F. 410; Southeastern Life Ins. Co. v. Palmer, 120 S.C. 490, 113 S.E. 310; Wilson v. Wilson, 83 Neb. 562, 120 N.W. 147.) Perhaps the word 'transaction' is such a word as was in the mind of Mr. Justice Holmes when he said, 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' (Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 62 L.Ed. 372, L.R.A.1918D, 254.)

[3, 4] "What then is the meaning, or the 'color and content', of the word 'transaction' as used in the contract before us? Should the phrase in question be interpreted to mean 'when any sale, lease or contract leading to a commission is closed as to any person on said Schedule 10' or should it be interpreted to mean 'when any negotiation (doing of any business) leading to a commission is closed as to any person on said schedule 10'. If the first suggested meaning be given to the word 'transaction', then perhaps, the language should be restricted to those cases in which sales, leases or contracts leading to commissions were closed as to the persons named on schedule 10 as principals. If the second suggested meaning be given, then the language is broad enough to include those cases in which the negotiations leading to a commission were

closed as to the persons on said schedule 10 either as principals or as representatives of others. It cannot be said from a reading of the contract whether the word 'transaction' was intended to convey the first or second meaning above suggested. It is one of those contracts where the words 'consistently admit of two interpretations, according to the subject matter in contemplation of the parties' and in which 'parol evidence might be admitted to show the circumstances under which the contract was made and the subject matter to which the parties referred'. Jenny Lind Co. v. Bower & Co., 11 Cal. 194, 198; see, also, McNeny v. Touchstone, 7 Cal.2d 429, 60 P.2d 986; Civ. Code, sec. 1647; Code Civ.Proc., sec. 1860. The trial court should therefore have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument."

The judgment is reversed.



11 Cal.2d 389

GOLDBERG v. LIST et al.

L. A. 16247.

Supreme Court of California.

June 2, 1938.

Rehearing Denied July 1, 1938.

1. Appeal and error ☞544(2)

On appeal on judgment roll alone, question presented is whether findings of trial court will support the judgment.

2. Sales ☞481

In conditional buyer's action against third person for conversion of fixtures purchased under conditional sales contract, the provision of the statute that statutory presumption of detriment caused by wrongful conversion cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of property to benefit of the owner without his consent did not preclude proof of the return of the property to the conditional sellers in mitigation of the damage suffered by the conditional buyer. Civ.Code, § 3337.

3. Sales **↪479(2)**

Under conditional sales contract, right of conditional sellers to require return of property on default came into existence by virtue of the retention of title by the conditional sellers and not necessarily by virtue of any provision of the contract; a consent by the conditional buyer to the retaking of possession by the seller on default being implied in the very form of the contract.

4. Sales **↪481**

As respects the liability of third person for the conversion of fixtures which had been purchased under conditional sales contract, action of third person in returning property to conditional sellers on demand when conditional buyer was in default would be presumed to have been pursuant to consent of conditional buyer given to sellers on entering into contract. Civ.Code, §§ 3336, 3337.

5. Trover and conversion **↪35**

The statute providing that the statutory presumption of detriment caused by wrongful conversion of personalty cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of property to benefit of the owner without his consent applies only to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation where the application was compelled by a legal duty. Civ.Code, § 3337.

6. Trover and conversion **↪44**

The underlying basis for recovery of full value of converted property by person having only limited or qualified interest therein is the fact that the party having the limited or qualified interest is liable over to the owner of the remaining interest, and that in order to be adequately compensated such person must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of the other owner.

7. Sales **↪467**

The rights and liabilities of parties to a conditional sales contract are controlled by the terms of the contract.

8. Sales **↪481**

Where conditional sales contract provides for continued liability after retaking of possession of property by sellers, buyer

should be permitted to recover against converter of property to extent to which he continues liable to conditional sellers.

9. Appeal and error **↪907(3)**

On appeal on judgment roll alone, findings of trial court are to receive such a construction as will uphold rather than defeat its judgment, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made.

10. Appeal and error **↪907(3)**

On appeal on judgment roll alone from judgment denying conditional buyer recovery against third person for conversion of goods covered by conditional sales contracts, reviewing court was required to assume in support of the judgment that contracts which were not before court contained no provision for continued liability on part of conditional buyer after retaking of possession of property by the conditional sellers where findings declared that goods were returned to sellers and that buyer suffered no damage.

11. Appeal and error **↪907(3)**

On appeal on judgment roll alone from judgment denying conditional buyer recovery against third person for conversion of goods on ground that goods were returned to sellers and that buyer suffered no damage, finding that buyer suffered no damage required reviewing court to assume that qualified or limited interest of buyer in personalty at time of conversion was of no value and was mere naked right of possession.

12. Sales **↪481**

If conditional buyer paid nothing down on purchase price and made no installment payments whatever under any of conditional sales contracts, limited interest of buyer had no monetary value and was mere naked right of possession, as regards amount recoverable from a converter who surrenders property to sellers.

13. Appeal and error **↪907(3)**

A judgment denying the conditional buyer recovery against third person for conversion of goods was required to be affirmed on appeal on judgment roll alone, where trial court found that goods were returned by third person to seller and that buyer suffered no damage.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action for conversion of trade fixtures and restaurant equipment by Samuel Goldberg against Ruth E. List and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

For prior opinion, see 72 P.2d 136.

Feinfeld & Feinfeld, John C. Stick, and Stick & Moerdyke, all of Los Angeles, for appellant.

John W. Carrigan and Harold E. Prudhon, both of Los Angeles, and John W. Carrigan, in pro. per., for respondents.

CURTIS, Justice.

[1] This action was instituted by the plaintiff, a conditional vendee of certain personal property consisting of trade fixtures and restaurant equipment, worth \$2,500, covered by several conditional sales contracts, for damages for the conversion of said property by defendants, strangers to said conditional sales contracts. At the time of said conversion, the vendee was in arrears in the payment of instalments due upon said property, and subsequent to said conversion, the property, upon the demand of the conditional vendors, was turned over to them by the defendants. Judgment was entered in favor of the defendants upon finding that plaintiff had suffered no damage by reason of said conversion. An appeal is taken by plaintiff from the judgment against him on the judgment roll alone, and the question, therefore, presented is whether or not the findings of the trial court will support the judgment.

The findings show that plaintiff, as lessee of two of the defendants, List and Stevenson, was in possession of a certain storeroom located in a building, part of which was used as a hotel. The court found that while plaintiff was in possession and occupation of said premises, but after he had ceased operating the restaurant business, the defendants "without cause, wrongfully, forcibly, unlawfully, wilfully and maliciously entered upon and took possession of said demised premises, together with the fixtures and equipment therein contained, against the will and without the consent of plaintiff * * * and converted said personal property to

their own use * * *." The trial court further found that "after the conversion of said personal property by the defendants, and their refusal to return said property to plaintiff upon demand, said defendants delivered, upon demand of the vendors thereof, said personal property then being purchased by plaintiff on conditional sales contracts to the various persons from whom plaintiff had purchased same under said conditional sales contract," and that "by virtue of the plaintiff being in arrears in his payments under said conditional sales contracts, the demand for the possession thereof by the vendors, and the return by said defendants of said personal property to said vendors, plaintiff did not suffer any damages by reason of the conversion of the personal property by said defendants."

Appellant challenges the conclusion of the trial court that he was not entitled to judgment against the defendants, who the trial court found converted the property to their own use, by reason of the fact that he suffered no damage, being in default under the conditional sales contracts at the time of the conversion, and the property having been returned to the vendors. Appellant claims that, although owning only a qualified interest as conditional vendee in the personal property, he is entitled to recover its full value, by virtue of the fact that the defendants had no ownership in the property. 24 Cal.Jur., 1057; California Cured Fruit Ass'n v. Ainsworth, 134 Cal. 461, 66 P. 586; Treadwell v. Davis, 34 Cal. 601, 94 Am.Dec. 770; Thompson v. Toland, 48 Cal. 99, Booth v. People's Finance, etc., Company, 124 Cal.App. 131, 12 P.2d 50. Appellant also relies upon section 3336 of the Civil Code, and section 3337 of the same code as compelling this conclusion. Section 3336 of the Civil Code provides that: "The detriment caused by the wrongful conversion of personal property is presumed to be: First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted * * *." Section 3337 of the Civil Code provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the be-

gining, by his subsequent application of the property to the benefit of the owner, without his consent." According to this theory, the fact that the converted property was returned by the respondents to the vendors under the conditional sales contracts upon their demand is an absolutely immaterial factor and cannot minimize the damages properly to be awarded to appellant, that is to say, the full value of the personal property converted.

[2-5] We cannot agree with this contention. In the first place, we are of the opinion that section 3337 of the Civil Code does not preclude proof of the return of the property to the vendors in mitigation of the damage suffered by a conditional vendee. While it is true that the conditional vendee herein did not give his express consent to the application of the property herein to his benefit, nevertheless, at the time the conditional vendee entered into the conditional sales contract, the right of the conditional vendor upon default to require the return of the property came into existence, not necessarily by virtue of any provision of the conditional sales contract but by virtue of the retention of title under this particular form of transaction. Jones on Chattel Mortgages and Conditional Sales, vol. 3, sec. 1283. In other words, a consent by the conditional vendee to the retaking of possession by the vendor upon default was implied in the very form of the contract itself. The vendors exercised this right by making demand upon the respondents for the return of the property, and the respondents having no other course open to them but to comply with said legally enforceable demand, may be reasonably said to have acted pursuant to the consent given by the vendee to the vendor upon the entering into of the conditional sales contract. In any event, we are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty.

[6] Moreover, an analysis of the authorities which support the rule that a recovery of the full value of the property converted may be had by a person having only a limited or qualified interest therein, indicates that the underlying reason and basis for such recovery is the fact that

the party having the limited or qualified interest is liable over to the owner of the remaining interest, and in order to be adequately compensated must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of such owner. The California cases of *California Cured Fruit Ass'n v. Ainsworth*, supra; *Treadwell v. Davis*, supra; *Thompson v. Toland*, supra, and *Booth v. People's Finance, etc., Company*, supra, all support, either by direct language to that effect, or from an examination of their facts, this theory. That this is the true basis for the permitting of the recovery of the full value of the property converted by one owning a qualified interest is demonstrated by the fact that when the action is against the owner of the general interest, the owner of a qualified interest can only recover for the value of such limited interest, in order "to avoid circuity of action". *California Cured Fruit Ass'n v. Ainsworth*, supra, (66 P. page 587) see, also, *Vandiver v. O'Gorman*, 57 Minn. 64, 58 N.W. 831; *Harrington v. King*, 121 Mass. 269; *Messenger v. Murphy*, 33 Wash. 353, 74 P. 480, 481; *Angell v. Lewiston State Bank*, 72 Mont. 345, 232 P. 90. It would seem, therefore, that the reason for the rule permitting recovery by the owner of a qualified or limited interest of the full value of personal property converted, rests not upon the fact that the convertor is a stranger and owns no interest in the personal property, but upon the fact that the owner of the qualified interest in addition to his own loss sustains a liability toward one owning a superior interest, which will need to be satisfied.

[7-9] The rights and liabilities of the parties to a conditional sales contract are controlled by the terms of the particular contract under which they are bound. Some of such contracts contain provisions for continued liability after the retaking of possession of the property by the vendor. If so, the vendee therein should be permitted to recover against the convertor of the personal property to the extent to which the vendee continues liable to the conditional sales vendor. However, in the instant case, the appeal has been taken on the judgment roll alone, and it is the rule especially applicable to such an appeal, that "findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found

by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made". Anglo-California Trust Company v. Oakland Rys., 193 Cal. 451, 460, 225 P. 452, 455. The contracts are not before us, and we must assume in support of the judgment that they contained no provision for continued liability on the part of the vendee after the retaking of possession of the property by the conditional sales vendor.

[10-13] The finding of the trial court to the effect that the vendee suffered no damage likewise compels the conclusion that the qualified or limited interest of the vendee in the personal property at the time of its conversion was of no value. This conclusion is necessarily predicated upon the inference that the conditional sales vendee paid nothing down on the purchase price and had made no installment payments whatever under any of the conditional sales contracts. If this be so, the limited interest of the vendee had no monetary value and was a mere naked right of possession. In view of the rule just above quoted, we must assume in support of the judgment that this inference may properly be made.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.



11 Cal.2d 351

**BRIED v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF
SAN FRANCISCO et al.**

S. F. 16000.

Supreme Court of California.

June 1, 1938.

Rehearing Denied June 30, 1938.

1. Costs ☞105

The object of the statute requiring the plaintiff in an action for slander to give an undertaking for costs is to protect the defendant and to secure to him the costs and charges he may be awarded if the judgment is in his favor. Gen.Laws 1931, Act 4317, § 1 et seq.

2. Costs ☞137

The giving of a bond for costs in an action for slander is not jurisdictional. Gen. Laws 1931, Act 4317, § 1 et seq.

3. Costs ☞119

In slander action, court has power to permit filing of bond for costs even after motion has been made to dismiss the action for lack of proper undertaking, and thereafter court may overrule such motion. Gen. Laws 1931, Act 4317, § 1 et seq.

4. Costs ☞134

Where defendant in slander action excepted to sureties on bond and demanded that they justify before judge and court sustained exception to justification of sureties and granted 5 days in which to file new bond, whereafter within time allowed by court plaintiff filed undertaking with same sureties which was in all essentials identical with first bond with exception of dates and notary public before whom the sureties appeared, action was not dismissible on ground that plaintiff had made no attempt to file undertaking as required by statute. Gen. Laws 1931, Act 4317, § 1 et seq.

5. Costs ☞134

Supreme Court is not inclined to require dismissal of slander action for failure to comply with statute requiring filing of bond for costs where it appears that plaintiff in good faith originally has endeavored to comply with statute by filing undertaking when suit was commenced. Gen.Laws 1931, Act 4317, § 1 et seq.

6. Mandamus ☞174

In proceeding for writ of mandate to require trial court to dismiss slander action for failure of plaintiff to file sufficient bond for costs after exception to justification of sureties on original bond had been sustained and plaintiff had been granted 5 days to file new bond, whereafter within 3 days plaintiff filed undertaking with same sureties as had appeared on original bond which was identical with original bond except for dates and notary public before sureties appeared, Supreme Court would assume that trial court was not of view that sureties as individuals were not sufficient to execute the bond in absence of showing in record to the contrary. Gen.Laws 1931, Act 4317, § 1 et seq.

7. Mandamus ☞174

In proceeding for writ of mandate to require trial court to dismiss slander action for failure of plaintiff to comply with order re-

quiring filing of new bond for costs after exception to justification of sureties on original bond had been sustained, Supreme Court would assume that court, which denied motion to dismiss, approved second bond filed by plaintiff within time provided by court, with same sureties and identical in form with original bond, except for dates and notary public before whom sureties appeared, notwithstanding failure of court to indorse his approval as required by statute. Gen.Laws 1931, Act 4317, § 1 et seq.

8. Costs ⇐134

Where, after exception to justification of sureties on bond for costs in slander action was sustained and plaintiff was given 5 days to file new bond, plaintiff filed undertaking with same sureties as had appeared on original bond and which was identical with original bond with exception of dates and notary public before whom sureties appeared, trial court should have passed on sufficiency of sureties to execute second bond. Gen.Laws 1931, Act 4317, § 1 et seq.

9. Costs ⇐134

Where exception to justification of sureties on bond for costs in slander action was sustained because sureties had not appeared to justify until eleventh day, the tenth day falling on a Sunday, and plaintiff was ordered to file new bond within 5 days and plaintiff within 3 days filed substantially identical undertaking with same sureties, second bond was sufficient compliance with statute and order of court to permit action to go to trial on merits, especially where, after dismissal of action for insufficiency of second bond, plaintiff would be prevented by statute of limitations from commencing new action. Gen.Laws 1931, Act 4317, § 1 et seq.

In Bank.

Proceedings for a writ of mandate by J. A. Bried against the Superior Court of the State of California, in and for the City and County of San Francisco, and C. J. Goodell, as Judge thereof, wherein an alternative writ of mandate was issued.

Alternative writ discharged, and petition denied.

Leo R. Friedman, of San Francisco, for appellant.

Carlton D. Dethlefsen and C. F. Eschwig, both of San Francisco, for respondents.

WASTE, Chief Justice.

Application for a writ of mandate.

On September 14, 1937, plaintiff, Oscar Nelson brought an action in the superior court against J. A. Bried (petitioner herein), as defendant for damages for alleged slander. Coincident with the filing of the complaint in that action, the plaintiff filed an undertaking for costs in the sum of five hundred dollars, conditioned as required by the pertinent statute, Gen.Laws 1931, Act 4317, § 1 et seq., which provides that a defendant in such an action, within ten days after service of summons, may give notice that he excepts to the sureties on the bond and requires their justification before a judge of the court at a specified time and place to be not less than five nor more than ten days thereafter, except by consent of the parties. Each of the sureties must appear before the judge at the time and place designated, and be examined on oath as to his sufficiency as a bondsman in such manner as the judge may determine. The act further provides that if the "judge find the undertaking sufficient, he shall annex the examination to the undertaking and indorse his approval thereon. If, the sureties fail to appear, or the judge finds the sureties or either of them insufficient, he shall order a new undertaking to be given. * * * In case a new or additional undertaking is ordered, all proceedings in the case shall be stayed until such undertaking is executed and filed, with the approval of the judge." If the undertaking as required be not filed in five days after the order therefor, the judge or court shall order the action to be dismissed. Act 4317, § 5, Deering's Gen.Laws 1931.

The defendant in the slander suit excepted to the sureties on the bond, and demanded that they justify before a judge of the superior court. On November 15, 1937, the court made the following order: "Order exception to justification of sureties sustained—five days to file new bond." Three days later, plaintiff filed an undertaking with the same sureties as had appeared on the previous bond, the second undertaking being in all essentials identical with the first one filed with the exception of the dates and the notary public before whom the sureties appeared. According to the agreed statement of facts filed herein no other undertaking has been filed by or on behalf of the plaintiff in said action. Defendant served on plaintiff notice of motion for an order dismissing the

action for failure to comply with the order of the court to file a new bond. That motion came on for hearing and was denied. Petitioner applied to the District Court of Appeal for a writ of mandate to compel respondent court to dismiss the action, which application was denied without opinion. He then applied to have the matter heard in this court, and an alternative writ was issued. By way of return to the writ, the respondents filed a demurrer and answer, in which it is alleged that an undertaking as required by the statute was filed on November 18; that subsequently and on the 26th of November, petitioner herein demurred to the complaint and then filed his exceptions to the sureties on the new bond and a notice of motion to dismiss the action (which motion was denied), and that on the same day the plaintiff in the action served and filed a notice of justification of the sureties on the bond. Respondents herein therefore contend that a bond is on file in the slander suit, and that it was filed within five days after the order of the court requiring a new undertaking to be filed.

Nowhere in the record filed in this court is there any showing as to what preceded the making of the order by the trial judge sustaining petitioner's exceptions to the justification of the sureties on the original bond. In response to the alternative writ issued out of this court, both parties appeared for argument, and the statement was made for the first time by counsel for the respondents that the judge's refusal to justify the sureties arose out of the fact that they had not appeared until the eleventh day—the tenth day falling on a Sunday; and that the judge, while admitting the point was rather technical, held that the sureties should not be allowed to justify. Thereupon the court made its order, for the filing of a new bond, and within three days such undertaking was filed with the same sureties as appeared on the rejected bond.

Respondents' position is that a dismissal of the case would be an abuse of discretion, in that, it "will result in plaintiff's suffering a bar of the statute of limitations"; that the law favors a trial on the merits, especially where, as here, "plaintiff in good faith originally endeavored to comply with the statute." The sole question seems to be: "Was the second bond tendered by plaintiff a 'new bond' as contemplated by the statute; if not, was it

mandatory upon the trial court to dismiss the action for failure to file such undertaking for costs within the time specified in the order of the court?"

[1-4] The object of the statute requiring the plaintiff in an action for slander to give an undertaking for costs is of course to protect the defendant and to secure to him the costs and charges he may be awarded if the judgment is in his favor. The giving of the bond is not jurisdictional. Even after a motion has been made to dismiss the action for lack of a proper undertaking, the court has power to permit the filing of such bond, and then may overrule the motion. *Stinson v. Carpenter*, 78 Cal. 571, 21 P. 304. It cannot be said that "no attempt" was made to file an undertaking in the case before us.

The case of *Shell Oil Co. v. Superior Court*, 2 Cal.App.2d 348, 37 P.2d 1078, relied on by petitioner, was a proceeding in prohibition to preclude the superior court from trying a libel case until the plaintiffs therein had first filed adequate cost bonds as required by the statute. The libel action was instituted by a number of employees of the Shell Company, and five defendants were made parties to the suit. The plaintiffs joined in one complaint, but their causes of action were kept separate, and each sought \$25,000 damages from the defendants. But one bond for costs in the sum of \$500 was filed. After answers had been filed, motions were made on behalf of the defendants to dismiss the action or require the filing of sufficient bonds to secure the defendants for their costs against each plaintiff. The appellate court held that the bond given was insufficient; that the lower court was without authority to proceed to try the case without first requiring the plaintiffs to file adequate bonds, reserving to the petitioners (defendants) the privilege of moving to dismiss the cause if the plaintiffs failed to file such bonds after order therefor was made. See, also, *Carter v. Superior Court*, 176 Cal. 752, 169 P. 667.

There is sufficient in this case to distinguish it from the *Shell Oil Company Case*, supra, for it is apparent, if the argument of counsel for respondents be correct, that the undertaking on file here was sufficient, the trial court's refusal to justify the sureties rested on a mere technicality. There is no showing that the bond was in any way defective or the sureties insufficient. Apparently, according to the statement of

counsel for respondents, there was some doubt in the mind of the trial judge as to the propriety of permitting the sureties to justify on the eleventh day.

[5-8] This court is not inclined to dismiss an action where it appears that a party, in good faith, originally endeavored to comply with the statute by filing an undertaking when the suit was commenced. *Becker v. Schmidlin*, 153 Cal. 669, 672, 96 P. 280. We assume, there being nothing in the record to the contrary, that the trial court was not of the view that the sureties, as individuals, were not sufficient to execute the bond. *Carter v. Superior Court*, 176 Cal. 752, 755, 169 P. 667. In view of the fact that the court denied the motion of defendant to dismiss the cause, we must assume that the second bond met with his approval, although, under the statute, *supra*, the judge was required to "annex the examination to the undertaking and indorse his approval thereon", which he apparently failed to do. However, even had the sureties been deemed insufficient at the time of the presentation of the original bond, their status may have changed between the time of the making of the order and the filing of the second undertaking to such an extent that they were then fully competent to justify as sureties. Their sufficiency to execute the second bond should have been passed upon by the trial court. There appears to be a conflict in the record as to whether the second undertaking was ever approved by the judge.

[9] We are of the view that the case should be allowed to go to trial on its merits, and that the second bond filed by plaintiff, although identical in terms with the first undertaking filed, is under the circumstances of record a sufficient compliance with the statute and with the order of the court, if in fact the order was based on the technicality above referred to, that is, that the sureties failed to appear to justify until the eleventh day. Our determination in this regard is strengthened by the fact that if we hold otherwise the plaintiff will be prevented by the statute of limitations from commencing a new action. He should not be deprived, under the circumstances herein set forth, of the right and opportunity to prove any meritorious claim for damages he may have against the defendant, which right would be defeated by a dismissal of the cause.

The alternative writ of mandate issued herein is discharged, and the petition for a peremptory mandate is denied.

We concur: LANGDON, J.; CURTIS, J.; HOUSER, J.; SEAWELL, J.; SHENK, J.



11 Cal.2d 338

In re WALLACE'S ESTATE.

O'MARA et al. v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES et al.

L. A. 16399.

Supreme Court of California.

May 31, 1938.

Rehearing Denied June 30, 1938.

1. Wills ⚡448

A construction favorable to testacy should obtain where language of will reasonably admits of such construction.

2. Deeds ⚡133(1)

Where an otherwise effective conveyance creates one or more prior interests, the maximum duration of which is measured by lives, years, or both, and then provides in substance that upon expiration of such interests, the ownership in fee simple absolute or corresponding interest shall belong to a person who is presently identifiable, such person has an indefeasibly vested remainder.

3. Executors and administrators ⚡315(5)

Where distribution decree following terms of will provided that testamentary trustee should pay specified sums to testator's widow and daughters, and, "upon the death or remarriage of said widow, the said trust shall terminate and said trustee shall distribute the balance" to named daughters, the words "shall distribute" created an indefeasible vested remainder in daughters, which did not lapse when daughter died before termination of the trustee's estate.

[Ed. Note.—For other definitions of "Distribute," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding in the matter of the estate of William W. Wallace, deceased. From a decree construing the decree of distribution in favor of the Farmers & Merchants National Bank of Los Angeles, as trustee thereunder, and others, Ellen Ruth O'Mara and others, objectors, appeal.

Reversed.

For prior opinion, see 73 P.2d 660.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Roy L. Herndon, of Los Angeles, of counsel), for appellants.

Eckman & Lindstrom, of Los Angeles (Morton L. Barker, of Los Angeles, of counsel), for respondent Phoebe A. Boisvert, as special administratrix.

Chenoweth & Whitehead, of Los Angeles, for respondent Farmers & Merchants Nat. Bank of Los Angeles, as trustee.

Richard L. Gray, of Los Angeles, for respondent Jessie W. Buchanan.

WASTE, Chief Justice.

The final decree of distribution entered in decedent's estate followed closely the provisions of his will concerning the creation of a trust and the payment by the trustee of the net income from the trust property to decedent's widow and two daughters, and further provided: "Upon the death or remarriage of said widow, the said trust shall terminate and said trustee *shall distribute* (italics added) the balance remaining in said trust fund to the two above-named daughters of decedent, in equal proportions, share and share alike." Margaret O'Mara, one of the daughters, predeceased the widow, and there was distributed to the Farmers and Merchants Bank, as trustee, the entire residue, to pay \$50 a month to the widow of Wallace, a second wife, and any excess of \$50 to be paid to his daughters by a former marriage, Jessie W. Buchanan and Margaret W. O'Mara, and, in the event of the death or remarriage of the widow, then the trustee should turn over the balance remaining to these two daughters. The question for determination is whether the daughters, under the decree of distribution of the father's estate, acquired contingent or vested remainders in the trust property. Both the trial court and the District Court of Appeal, 73 P.2d 660, held that they were contingent remainders, the effect of which, obviously, is intestacy as to one-half of the trust property because of the lapsing of one daughter's interest in the remainder by rea-

son of her death prior to the termination of the trust.

[1] A construction favorable to testacy should obtain where the language used reasonably admits of such construction. Estate of Dunphy, 147 Cal. 95-99, 81 P. 315; Estate of Ingram, 104 Cal.App. 1-8, 285 P. 365. In support of the contention that a contingent remainder only was created in the daughters, it is argued that to create a vested remainder it is necessary that there be a present conveyance of a future estate to the beneficiary; that the language employed in the decree of distribution here involved (which varies slightly from but is now controlling of the language of the will) (Keating v. Smith, 154 Cal. 186, 97 P. 300), required independent action on the part of the trustee before title passed to the beneficiaries and that it contains no language giving to the daughters a present vested interest in the corpus of the estate.

The question presented is one of construction and turns principally upon the meaning of the words "shall distribute" appearing in the decree of distribution. The District Court of Appeal construed these words to be the equivalent of "to transfer and convey" and "shall deliver", appearing in cited cases, and held no vested estate in remainder was created. On the other hand, the words "shall distribute", employed in the present case, may reasonably be interpreted to mean that upon the death of decedent's widow the trustee shall distribute or deliver possession of the trust res in which the decedent's daughters already had a vested remainder. In construing the word "distribute" in Estate of Dunphy, supra, as used by the testator in that case, we quote (page 317): "There is no direction whatever to the trustees to convey the property to the remaindermen, and no direction to them at all upon that subject. There is nothing in the language used (as there was in the will of Fair) which necessarily means that title could pass only by a conveyance by the trustees, or which embarrasses the court in upholding the will by construing the language as constituting valid devises, and not an invalid trust to convey. In each of the three cases, in the latter part of the language, clear words of direct devise—'go to'—are used; and to support appellant's contention it must be rigidly held that prior words—in two instances 'shall be transferred and distributed', and in the other 'shall be paid'—necessarily mean that the title to the property could pass only by the trustees'

conveyance. The word 'distributed' is not a technical word in conveyancing, and is not usually found in deeds. If it have any legal technical meaning, it has such meaning with reference to decrees of distribution in probate courts. The use of this word, therefore, contains no intimation of an intent to create a trust to convey, or that the testator supposed that a conveyance by the trustees was necessary to pass title. Neither does the word 'transfer' necessarily mean a passing of the title to land by a trustees' conveyance, and it would not have that meaning even if there had been a direction to the trustees to transfer. And the words 'shall be paid', while inapt as applied to real property, simply mean, unless we are to defeat the testator's will by holding them to have no meaning, that the property is devised to the remainderman. There is nothing in them implying a conveyance of the title by the trustees. The contention of appellant that, because the property is devised in the first instance in trust to trustees, therefore it could be 'distributed' or 'transferred', or 'paid' only by a conveyance executed by them, and that therefore the will must necessarily be construed as an invalid trust to convey, is not maintainable. A trustee takes only such estate as is necessary for the performance of his trust, and it terminates when the trust ends. Of course, as the trustees would be in possession of the property at the time of the death of any one of the persons named, they would have to transfer it by delivering possession thereof to the remaindermen."

[2] In that case the court again said: "It is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction." Such a construction here would appear to be in line with the Restatement of the Law of Property (sec. 157, comment h, p. 548), where it is stated that "when an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum duration of which is measured by lives, or by years, or by a combination of lives and years, and then provides, in substance, that upon the expiration of such prior limited interests, the ownership in fee simple absolute of the land, or the corresponding interest in the thing other than land, shall belong to a person who is presently identifiable, such person has an indefeasibly *vested* remainder."

[3] The above discussion covers the present case. Here, by the decree of dis-

tribution there was created a prior interest in the trustee, measured by the widow's life for a period of years terminating with her remarriage, for the purpose of paying over the income as designated, and upon the expiration of such prior limited interest, the absolute ownership was to pass to then identifiable persons (testator's two daughters); hence each daughter, under the decree of distribution, by the application of the above stated rule and illustration, acquired an indefeasible *vested remainder* which did not lapse upon the death of either daughter prior to the expiration or termination of the prior limited estate in the trustee.

Moreover, the suggested result would seem to be more in harmony with the testator's desire and intention. Instead of dying intestate as to one-half the trust property, such one-half devolved upon the heirs (children in this case) of the daughter who died before the termination of the prior limited interest in the trustee.

The judgment is reversed.

We concur: LANGDON, J.; CURTIS, J.; HOUSER, J.; SEAWELL, J.



11 Cal.2d 366

**CARR v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

S. F. 15656.

Supreme Court of California.

June 1, 1938.

Rehearing Denied June 30, 1938.

I. Executors and administrators ☞513(10)

Where it was apparent to probate court, in passing upon account of bank as executor, that stock belonging to estate had greatly depreciated in value, during administration, fact that interested parties had agreed that stock should be distributed to bank as trustee to be held for benefit of minor beneficiaries in lieu of cash did not withdraw from probate court issue of whether executor's account was surchargeable, and hence decree settling account was res judicata against claim of one of beneficiaries in subsequent suit that executor had negli-

gently and fraudulently refrained from selling stock. Probate Code, § 931.

2. Executors and administrators ⇨510(9)

The reviewing court, in determining whether or not probate court in settling executor's account considered matter of surchargeability of account, was required to presume that probate court performed its duty.

3. Executors and administrators ⇨513(3)

Where agreement between interested parties that stock belonging to estate should be distributed to executor as trustee to be held for benefit of minor beneficiaries in lieu of cash bequests of will was presented to probate court for its approval and was incorporated into decree of distribution, alleged fraud, if any, in procuring agreement was within issues of its fairness and advisability of approval of agreement by probate court, and constituted "intrinsic" in contradistinction to "extrinsic fraud."

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

4. Executors and administrators ⇨513(10)

A beneficiary under testamentary trust could not recover from trustee, which was also executor, for negligently failing during administration of estate to apply for distribution to it of trust bequests in cash because of mismanagement on part of executor, where order settling executor's account and for final distribution conclusively negated charge of mismanagement on part of executor. Probate Code, § 931.

5. Executors and administrators ⇨513(9)

A testamentary trustee, which was also executor, was not liable for failing to protect interests of minor beneficiaries in connection with execution of agreement under which trustee was authorized to hold stock belonging to estate for benefit of beneficiaries in lieu of cash bequests of will, where agreement had been incorporated into decree of final distribution which was thereby conclusive on issue of trustee's liability. Probate Code, § 931.

6. Trusts ⇨234

Where interested parties agreed that stock belonging to estate should be distributed to bank, which was both executor and trustee under will, to be held by bank for benefit of minor beneficiaries, and agreement was incorporated into decree of final distribution, bank was not liable as trustee

for loss resulting from substantial depreciation in value of stock on ground that it had abdicated control of trust estate by virtue of agreement under which it surrendered control of power of sale if stock continued to decline.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Philip Davis Carr against the Bank of America National Trust & Savings Association to recover damages resulting from failure of the bank to sell certain stock belonging to the estate of plaintiff's father until it was so devaluated that the purposes of the testamentary trust could not be fulfilled. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Hubert Wyckoff, Jr., of San Francisco, for appellant.

Sullivan, Roche & Johnson and Keyes & Erskine, all of San Francisco, Rea, Free & Jacka, of San Jose, and Louis Ferrari and G. D. Schilling, both of San Francisco, for respondent.

CURTIS, Justice.

This litigation is the outgrowth of the financial misfortunes of the Carr family resulting from the 1929 stock market crash and the falling value thereof of Transamerica stock. The basic question is whether or not the appellant, Philip Carr, can recover from the Bank of America, acting as executor of the will of his father, Harry Cummings Carr, and acting as trustee of a trust created by said will for said Philip Carr, as beneficiary, for the loss occasioned by the failure of the bank to sell Transamerica stock until it was so devaluated that the purposes of the trust could not be fulfilled.

The facts are as follows: Harry Cummings Carr from 1903 to 1927 was a banker in Porterville. In that year he became vice-president of the Bank of America in San Francisco and removed his family residence to Palo Alto. On August 23, 1929, he died testate, leaving a widow, Ethel Carr, two adult sons, John and Jesse, and two minor children, Harriette, then 19 years of age, and Philip, then 17 years of age. His estate, which was but little indebted, was appraised as of the date of his death

at \$120,103.77. \$109,532.62 thereof consisted of 1961 shares of Transamerica stock. The will of decedent appointed the Bank of America executor and also trustee of certain trusts created therein. The will created four trusts for the benefit of the two minor children; a \$7,000 educational trust for each, the income and principal to be used for their education; a \$20,000 trust for Harriette with payment of the income to her for life and the principal to her issue; and a \$15,000 trust for Philip, the income to be paid to him until he reached the age of 25 years and then the principal to be distributed to him. The will also left \$15,000 to each of the adult sons, which amount had been received by them as advancements prior to his death. His wife was named as residuary legatee. He had previously made a gift in contemplation of death to her of real and personal property amounting to some \$21,321.85, and she also received insurance in the amount of \$37,000 upon his death. The will was admitted to probate on September 23, 1929, and the bank thereupon qualified as executor. On October 25, 1929, occurred the stock market crash. The following table shows the subsequent devaluation of the Transamerica stock:

August 23, 1929 (date of decedent's death).....	\$109,532.63
May 29, 1930.....	81,000.00
August 30, 1930.....	45,616.50
September 30, 1930.....	38,013.75
December 31, 1930.....	24,790.25
December 31, 1931.....	4,905.00
June 6, 1934 (date of filing action)	11,000.00

On May 29, 1930, the estate, except for the payment of a deficiency income tax of \$5,200, assessed by the federal government for the year 1928, was ready to be closed out, and although the market value of the stock had declined to approximately two-thirds of its market value at the time of the death of decedent, the bank at that time could have sold the Transamerica stock owned by the estate for approximately \$31,000 in excess of the amounts required to satisfy the trust legacies in full. On that day the bank filed its first and final account of the administration of the estate, and a petition that the Transamerica stock held by the bank as executor be distributed to it as trustee in lieu of the payment of the trust bequests in cash because of the low market value of the stock then prevailing.

The petition was set for hearing for June 12, 1930, and was later continued. Thereafter, and before the hearing of the final account and petition, by reason of the continued decline in the value of the stock upon the market, the total market value of the stock owned by the estate became insufficient to satisfy the trust legacies by some \$4,000. On August 4th a conference was held in which the trust officer of the Bank of America, and the widow and three children, Jesse, Harriette and Philip (John being absent from the state), participated to determine what course should be pursued. At this time the Transamerica stock was worth only \$44,000 and to close the estate there was required \$5,200 for an income tax delinquency, plus \$49,000 for the trust legacies, or a total of \$54,000. On August 30, 1930, an agreement, suggested by the trust officer of the bank, and drafted and prepared by the attorney for the estate, was signed by the widow as party of the first part, and the two minor children of the deceased, Harriette and Philip, as parties of the second part. A consent to said agreement was signed by the two adult sons, John and Jesse. This agreement provided, in effect, that the shares of stock, instead of being sold and the proceeds turned over in cash to the trustee to establish the trusts in part, should be distributed to the trustee and allocated by the trustee to the different trusts in the same proportions as each trust bequest bore to the aggregate thereof as set out in the will. The agreement further provided that the widow should advance to the executor out of her insurance money sufficient money to enable the executor to pay the deficiency income tax and, in order that she might be reimbursed out of the estate for this expenditure, that the shares of Transamerica stock should not be sold until the market value of the shares exceeded the amount necessary to satisfy the trust bequests in full, after which she, at her option, might demand that the stock be sold and the excess turned over to her. The agreement further provided that all of the residue of the estate should be turned over to her. This agreement was presented to the probate court by the bank upon an amended petition for distribution filed on September 20, 1930, and distribution in accordance with said agreement prayed for. The bank also filed at the same time a supplemental account as executor. On September 30, 1930, the probate court made its order settling the bank's account as

executor and distributing to the bank as trustee the shares of Transamerica stock instead of cash, subject to the right of Mrs. Carr to cause said shares to be sold when the market price thereof should exceed the aggregate of the trust bequests and to take any excess. The minor children partially completed their college courses under financial limitations and some 462 shares of the Transamerica stock were subsequently sold by the bank as trustee to furnish funds for this purpose. Thereafter Philip Carr and his sister Harriette disaffirmed said agreement, and filed two separate actions against the bank to recover the cash value of the trusts in their favor, aggregating \$49,000, created by the will of their father, less the amounts of money already received by them from the bank in its administration of the trusts.

The complaints charged that the bank as executor negligently and fraudulently refrained during the administration of the estate from selling shares belonging to the estate in order to support the market for similar shares held by the bank as collateral security for loans theretofore made by it, and that the bank as trustee of the trusts created by the will negligently and fraudulently failed during the administration of the estate to apply for partial or final distribution to it of the trust bequests in cash as required by the terms of the will. The complaint further charged, in order to state an extrinsic fraud which would justify the vacating of the decree of final distribution and the setting aside of the order settling the final account of the executor, that the bank, in order to avoid, upon the settlement of the final account, an investigation of whether the executor's account should be surcharged for the loss occasioned by its failure to sell said shares, fraudulently secured an agreement of all the parties interested in the estate providing that the shares should be distributed to the bank as trustee and that the bank should continue to hold the shares in trust, and alleged that the final decree of distribution was made by the probate court in accordance with said fraudulently procured agreement. At the trial of the consolidated actions, the plaintiffs called two witnesses, who had been officials of the respondent bank during the period of time involved here, in an attempt to prove that the bank during the period of administration of the estate following the market crash was fraudulently retaining the estate's shares to support the market for its collateral. An objection by the respondent

bank to the admissibility of this testimony was sustained by the court. At the conclusion of the presentation of the plaintiffs' case, a motion for a nonsuit was made by the bank, which was denied by the court. The bank thereupon, before any further evidence was taken, submitted the case to the court for its decision upon its merits, and judgment was rendered in favor of the bank. Subsequently the appeal taken from said judgment by Harriette Carr was dismissed, and there is now before this court only the appeal of Philip Carr.

At the very threshold of the appeal, the important question is presented for decision as to whether or not the decree settling the bank's account as executor is *res judicata* and conclusive against the appellant's claims of negligence and fraud. In this action, the plaintiff seeks to hold the bank liable not only in its capacity as executor of the last will and testament of Harry Cummings Carr, deceased, but also in its capacity as trustee of the testamentary trusts created by the will of said deceased, and specifically prays for an accounting and for the removal of said bank as trustee. The solution of this problem, therefore, requires a discussion of whether the order settling the bank's account as executor and for final distribution was conclusive not only with regard to its acts as executor but also with regard to its acts as trustee.

There can be no doubt that if the agreement of August 30, 1930, be eliminated from consideration, the order settling the executor's account is *res judicata* against any claim of liability against the bank in its capacity as executor for negligence or fraud, and such determination is binding upon all the parties interested in the estate, including minors who were not represented at said hearing by a guardian. This is the direct holding of *Ringwalt v. Bank of America, etc., Ass'n*, 3 Cal.2d 680, 681, 45 P.2d 967. In that case an attempt was made to state a cause of action against the Bank of America, as executor of the last will and testament of Marie Louis Adams, for failure to sell assets of the estate consisting of stock in the respondent bank and the Bancitaly Corporation, which it was alleged depreciated in value during the course of administration of the estate in the sum of \$33,211.87. No appeal was taken from the final decree of distribution. The opinion squarely holds that, by virtue of section 1637 of the Code of Civil Procedure, the substance of which is now incorporated into

section 931 of the Probate Code, although minors would have had the right to move for cause to reopen an account before final distribution, nevertheless when final distribution had occurred and the decree had become final, it was conclusive as to all parties interested in the estate, including minors. The opinion also held that the duty to have a guardian for such minors appointed rested on the mother who was their natural guardian and that no such duty rested upon the respondent bank. Moreover, the court in that opinion specifically held that the issue of whether or not the bank was properly surchargeable for negligence in failing to sell was before the court and should have been heard upon the settlement of the final account of the bank as executor, as the fact was manifest, in the usual course of things, on the face of the final account and petition for final distribution as well as in the decree of distribution. It is to be noted, however, that in the Ringwalt Case the bank simply filed its account and then stood mute and inactive. The opinion in the Ringwalt Case expressly states (page 969) that the court failed to find in the allegations of the complaint "anything done by the respondent bank to prevent, foreclose, or hinder" a hearing of the issue of whether the executor's account was properly surchargeable. Appellant argues that in the instant case the agreement of August 30, 1930, whereby the parties agreed that the shares of Transamerica stock should be distributed to the bank as trustee, and such shares held by the bank for the benefit of the minor beneficiaries in lieu of the cash bequests of the will, as a matter of fact withdrew from the probate court the issue of whether the executor's account was surchargeable, and that the procurement by the bank of the execution of the agreement of August 30, 1930, by the parties interested in the estate, prevented a real hearing of such issue, thereby constituting extrinsic fraud and supplying the allegations lacking in the Ringwalt Case of something done by the respondent bank "to prevent, foreclose, or hinder" a hearing upon the issue of the bank's liability, as executor, for negligence and fraud in the administration of the estate. The appellant argues that the fraudulent procurement and the use of the agreement upon settlement of the estate in view of the nondisclosure and concealment of its adverse interest by the respondent bank prevented a real adversary hearing of the executor's account, and this being so, the decree so procured is now vulnerable to at-

tack. The trial court found that the bank did not exercise any dominion or control over the parties interested to procure the execution of the agreement, and this finding finds support in the record. The extrinsic fraud relied upon by the appellant in this regard is therefore necessarily limited to the procurement by the respondent bank of the execution of the agreement by the minor beneficiary and the nondisclosure and concealment from him of the possibility that the executor's account might be surcharged upon a claim of negligence and fraud in the administration of the estate by the bank, together with the presentation of such agreement to the probate court with no disclosure to the court of the bank's interest adverse to the sale of the shares of Transamerica stock during the administration of the estate and the benefit to the bank of the agreement which would in all probability prevent the sale of the Transamerica shares if the shares continued to decline, since such sale would require a court order and the consent of all the interested parties, including the two adult sons.

[1,2] In view of the fact that the probate court was possessed of the power and charged with the duty of scrutinizing with care the accounts of the executor, and inquiring generally into the truth and accuracy of the facts set forth therein, and was at absolute liberty to refuse to make the decree of final distribution in accordance with the said agreement if in its judgment the distribution agreed upon by the parties to said agreement was not a proper method of distribution, we cannot agree with the contention of appellant that the issue of the surchargeability of the executor's account was withdrawn from judicial investigation. It was apparent to the probate court from the documents presented upon the executor's account and petition for final distribution, that the respondent bank had retained said shares of stock during the administration of the estate and that they had greatly depreciated in value. It was also within the knowledge of the probate court that during all of the time under consideration the minor beneficiary, appellant herein, was under age and was not represented by a guardian, and that for this reason the accounts of the executor should be scrutinized more closely than if all the parties interested were adults. The agreement was presented to the probate court for its approval, and the question of whether or not such a plan of distribution

was advisable and proper, in contravention to the terms of the will creating the trust bequests in cash, was directly presented. The probate court, regardless of the agreement, had the duty to inquire into the fairness of the case, and we must presume that it performed its duty.

[3] Moreover, the agreement itself was presented to the probate court for its approval and for its incorporation into the decree of distribution, and this fact compels the conclusion that any fraud in its procurement, now alleged, was necessarily within the issues of its fairness and advisability of approval of such agreement by the probate court and, even if fraud were proven, it would constitute intrinsic in contradistinction to extrinsic fraud. In *Caldwell v. Taylor*, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194, we held (page 760): "It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based." In the instant case, not only was the issue of whether the bank fraudulently retained the shares during administration presented to the probate court upon the executor's account, but also the question of whether it fraudulently secured the agreement upon the petition for final distribution. It follows that the order settling the bank's account as executor and for final distribution was conclusive with regard to its acts as executor.

[4,5] Although the respondent bank has filed no account as trustee, and the order settling the executor's account and for final distribution at first blush would not seem to be a bar against a claimed liability against the bank as trustee, nevertheless, there seems to be no escape from the conclusion that the court's negative determination of the issue of the bank's liability as executor upon the ground of negligence and fraud, of necessity, settles that issue when the question of the bank's negligence and fraud as executor is brought into question in the attempt to charge the bank as trustee. An analysis of the trustee's claimed liability for failure to petition for final or partial distribution in order to get the trust assets out of the hands of the executor and into its own hands as trustee is based upon a duty owing by the trustee to prevent the estate from being mismanaged or despoiled

during the course of administration. Estate of O'Connor, 2 Cal.App. 470, 473, 84 P. 317. We have no doubt that such a duty rests upon the trustee, but the order settling the executor's account and for final distribution conclusively negatives the charge of mismanagement, negligence or fraud on the part of the bank as executor. If this be true, no duty devolved upon the trustee to move to obtain control of the trust assets. Likewise the issue of whether the trustee was liable as trustee in not protecting the interests of the minor beneficiaries, in the execution of the agreement of August 30, 1930, must be held to have been conclusively determined in the negative by the order decreeing final distribution inasmuch as that order conclusively determined that the method of distribution therein planned was proper and advisable. That this is the conclusive effect of the order settling the executor's account and for final distribution is established by *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 258 P. 387.

[6] However, the argument is presented that the trustee was liable as an insurer, regardless of any negligence or fraud on the part of the executor, by reason of its abdication of the control of the trust estate by virtue of the agreement of August 30, 1930, wherein it surrendered control of its power of sale if the stocks continued to decline and bound itself to sell only at the option of the widow if the stock should thereafter rise in value. The cases of *Estate of Wood*, 159 Cal. 466, 114 P. 992, 36 L.R.A., N.S., 252, and *Gaver v. Early*, 191 Cal. 123, 215 P. 394, are California cases cited in support of this doctrine. These were both cases where the trustee surrendered control of the trust assets to the surety on its bond. These cases are only applicable by analogy, and should not be applied to a trustee before distribution who acquiesces in an attempt by the executor to work out some scheme for the benefit of all the parties interested in the estate. In other words, although the office of trustee devolves upon the trustee upon the death of decedent, this harsh rule should only be applied to a surrender of control by the trustee after the trust funds come into his possession as trustee. In the instant case, the trust estate came to the trustee already burdened by the terms of the agreement of August 30, 1930, incorporated in the decree of final distribution. It cannot be held

liable by virtue of the fact that it abided by the terms of said decree.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.



DAVIS v. LOS ANGELES COUNTY et al.
(WILLIS et al., Interveners).*

Civ. 11832.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1938.

Rehearing Denied June 24, 1938.

Hearing Granted by Supreme Court
July 25, 1938.

1. Statutes $\S$ 251

Generally, Legislature must judge of necessity for enacting urgency legislation, but act showing on its face that it is not necessary for immediate preservation of public peace, health or safety cannot become immediately effective. Const. art. 4, $\S$ 1.

2. Statutes $\S$ 251

The courts must uphold statute as urgency legislation, if it can be rationally concluded from statement of facts therein that it is truly urgency matter, but must hold that act does not become effective until 90 days after final adjournment of legislative session at which passed, if only reasonable conclusion from facts appearing on its face is that it is not immediately necessary for preservation of public peace, health or safety. Const. art. 4, $\S$ 1.

3. Statutes $\S$ 35½

Though Legislature's right to pass urgency measure must be upheld in proper case, it is court's duty to sustain referendum provisions of Constitution, where no necessity exists for immediate operation of legislation. Const. art. 4, $\S$ 1.

4. Statutes $\S$ 251

The act providing for submission of issue whether board of education should be authorized to establish plan for retirement salaries of teachers and other employees thereof at special election consolidated with

other municipal and school district elections was not urgency measure necessary for immediate preservation of public peace, health or safety because of saving to taxpayers by consolidation of elections. School Code $\S$ 5.1100 et seq., as added by St.1937, p. 153, $\S$ 2; St.1937, p. 159, $\S$ 3; Const. art. 4, $\S$ 1.

5. Statutes $\S$ 251

The statute authorizing submission to voters of proposed plan for retirement salaries of teachers and other school district employees was not emergency measure effective immediately because of danger of some school boards taking advantage of statutory provisions empowering them to discharge employees of advanced age, especially in view of Teachers' Pension Act. School Code, $\S$ 5.800 et seq.; $\S$ 5.1100 et seq., as added by St.1937, p. 153, $\S$ 2; St.1937, p. 159, $\S$ 3; Const. art. 4, $\S$ 1.

6. Statutes $\S$ 251

The Legislature may not, by its mere pronouncement, create emergency authorizing urgency legislation, where none exists in fact. Const. art. 4, $\S$ 1.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Elizabeth A. Davis, as a taxpayer, against Los Angeles County and others for declaratory relief and an injunction against collection of taxes and administration of funds in accordance with provisions of an act relating to the retirement of school district employees, wherein Minnie Todd Willis and another intervened. From a judgment denying the relief sought, plaintiff appeals.

Reversed with direction.

Roy A. Linn, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

Tanner, Odell & Taft, and Ray C. Eberhard, all of Los Angeles, for interveners.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., Agnes R. Polsdorfer, T. A. Westphal, Jr., and Lynn J. Gillard, Deputy Dist. Attys., all of Oakland, amici curiæ.

WOOD, Justice.

Plaintiff commenced this action as a taxpayer for declaratory relief and to obtain

an injunction preventing various officials named as defendants from collecting taxes and administering funds in accordance with the provisions of part 5, Division 5, of the School Code, § 5.1100 et seq. The action was tried upon a stipulated statement of facts. Plaintiff appeals from a judgment denying her the relief sought.

The legislature of California at its 1937 session enacted chapter 59 of the Statutes of 1937, p. 153, § 2, adding a new part to the School Code relating to the retirement of employees of school districts. The act was passed as an urgency measure so that it might become effective immediately. It was signed by the Governor on April 22, 1937, and on April 23, 1937, the Board of Education of the City of Los Angeles called an election, which was held on May 4, 1937, to permit the voters to pass upon the question whether the board should be authorized to establish a plan for district retirement salaries for the teachers and such other employees "as such governing board may determine". At the election on May 4, 1937, the voters authorized the governing board of the Los Angeles City School District, the Los Angeles City High School District, and the Los Angeles City Junior College District to put such plan in operation.

The act passed by the legislature authorized the Board of Education to submit to the voters the proposition of establishing a plan for district retirement salaries and required that the plan must provide for the administration of the funds and the payment of the retirement salaries by a district retirement board to be composed of not less than three nor more than seven members, of whom, one must be the county treasurer and one must be an employee of the district. Under the terms of the act the members of the district retirement board are to serve for such terms as may be specified by the governing board of the district or districts. They must take an oath of office and shall have charge and control of the district retirement fund, its investment in securities, and the payment of all retirement salaries payable therefrom. The Board of Education has determined that it is necessary to raise by taxation the sum of \$981,500 for 1937-38 to pay retirement salaries.

The plaintiff seeks to prevent the collection of taxes determined by the board to be necessary for the purposes of the retirement plan on a number of grounds. First, she contends that the act permitting the

calling of the election held on May 4, 1937, is invalid for the reason that the statement of facts contained in the measure shows on its face that the act could not be passed as an urgency measure. Second, that the act is invalid as an urgency measure for the reason that it provides for the creation of new offices and changes the duties of officers. Third, that the act is invalid for the reason that it lacks uniformity and improperly delegates legislative functions to the boards of education. Fourth, that the election of May 4, 1937, is void for irregularities.

In considering plaintiff's first contention consideration must be given to two provisions of the Constitution of California. Section 1 of article 4 of the Constitution provides in part: "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections * * * and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each House. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon; provided, however, that no measure creating or abolishing any office or changing the salary, term or duties of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be construed to be an urgency measure. Any law so passed by the Legislature and declared to be an urgency measure shall go into immediate effect." It will be noted that in the first part of the section from which quotation has been made it is provided that no act of the legislature shall go into effect until ninety days after the final adjournment of the session of the legislature. Clearly the purpose of this provision is to enable the citizenry to file a petition demanding a referendum to the voters of the issues contained in the enactment. In a later part of the section it is provided that the legislature may put the measure into immediate effect in proper circumstances, but this may be done only for the immediate preservation of the public

peace, health or safety. If the legislature should decide that an act is to go into immediate effect it must set forth in the act a "statement of the facts constituting such necessity." The act under consideration contains the following statement of facts to show the necessity for its taking immediate effect: "The School Code was amended by the Legislature at its 1935 session to permit governing boards of school districts to discharge teachers who have reached the age of sixty-five years, which amendment will become effective September 1, 1937. Many boards of education desire to take advantage of the provisions of said amendment, and to avoid the hardships which will follow the discharge of many teachers aged sixty-five years or more and to avoid the possibility of placing such teachers and their families and dependents on relief rolls of their respective counties, such boards desire to establish district retirement plans for their employees, as authorized herein. This act requires that the establishment of such plan be submitted to the vote of the people of the school district, and many municipal and school district elections are to be held during the months of April and May, 1937, at which such propositions can be submitted to the voters of the respective districts, at a large saving to taxpayers of the respective districts." St.1937, p. 159, § 3.

[1-3] It is doubtless the general rule that the legislature must judge of the necessity for enacting urgency legislation. This rule, however, is subject to the qualification that if the statement of facts contained in the enactment shows upon its face that it is not necessary for the immediate preservation of the public peace, health or safety the act cannot become immediately effective. The rule is well stated in *Hollister v. Kingsbury*, 129 Cal.App. 420, 18 P.2d 1006, (page 1008) "Under the California Constitution, it is the sole prerogative of the Legislature to determine the necessity for emergency legislation, which may not be disturbed by a court, except that, since our Constitution requires the statement of the facts constituting the necessity to be recited in the act, it follows that, if these facts clearly show that a public necessity does not exist, then the declaration of the necessity falls of its own weight." If it can be rationally concluded from the statement of facts that the legislation is truly an urgency matter the courts are bound to uphold it as such. *McClure v. Nye*, 22 Cal.App. 248, 133 P. 1145, 1147. But if the only reasonable con-

clusion to be reached from the facts which appear on the face of the enactment is that the measure is not immediately necessary for the preservation of the public peace, health or safety, it becomes the duty of the courts to hold that the measure did not become effective until after the expiration of the period of ninety days as provided in the Constitution. The courts have not hesitated to so decide on proper occasion. *Ex parte Hoffman*, 155 Cal. 114, 99 P. 517, 132 Am. St.Rep. 75. Although the right of the legislature to pass urgency measures must be upheld in proper cases it is nevertheless the plain duty of the courts to sustain the referendum provisions of the Constitution when in fact no necessity exists for the immediate operation of the legislation under review.

[4] One of the reasons contained in the legislative statement of facts to justify the classification of the act as an urgency measure is that many municipal and school district elections are to be held during the months of April and May, 1937, and that a saving to the taxpayers will result from the consolidation of the election provided for in the act with other elections. Although economy in the matter of conducting elections is to be desired, it cannot be justly contended that the public peace, health or safety would be endangered by submitting the issue of the proposed plan at a special election, at which the voters would have more time to inform themselves concerning the merits of the question which must be determined by their ballots. Moreover, it is manifest that the "saving to taxpayers" mentioned in the legislative statement could be brought about by the submission of the issue to the voters at an election consolidated with a municipal or school election regularly conducted at a date later than April or May, 1937.

[5,6] The other reason given in the legislative statement of facts likewise fails to show that the act can reasonably be classified as an urgency measure. It is entirely unreasonable to hold that the public peace, health or safety would be in immediate danger if some of the boards of education should give effect to their "desire to take advantage of the provisions of said amendment" whereby they were empowered on September 1, 1937, to discharge certain employees of advanced age. Certainly the various boards of education are in position to properly regulate the tenure of their elderly employees without bringing about

the dire condition which counsel for defendants predict might result. If the words "public peace, health or safety", are to be given their ordinary meaning it cannot be held that the enactment was an "urgency measure necessary for the immediate preservation of the public peace, health or safety". To hold otherwise would be to distort the plain meaning of these words. The legislature may not by its mere pronouncement create an emergency where none exists in fact. Moreover, those teachers who may have rendered lengthy service would upon their discharge be entitled to a pension of \$50 per month in addition to certain annuities, as provided in part 4, Division 5, of the School Code, § 5.800 et seq. This pension is safeguarded expressly by the provisions contained in section 5.1110 of the act under review: "The retirement salaries provided for in this act shall be in addition to any other retirement salaries received by any teacher under Part IV of this division or as may be otherwise provided by law."

Since the act was not effective as an urgency measure it did not become operative until ninety days after the adjournment of the legislature. Consequently the election of May 4, 1937, was and is void. Our disposition of the contention hereinbefore discussed makes it unnecessary to pass upon other points presented by plaintiff.

The judgment is reversed and the superior court is directed to grant to plaintiff relief in accordance with the prayer of her complaint.

We concur: CRAIL, P. J.; McCOMB, J.



26 Cal.App.2d 624

NIGHTBERT et al. v. FIRST NAT. BANK
OF BAKERSFIELD et al.

Civ. 1888.

District Court of Appeal, Fourth District,
California.

May 27, 1938.

Hearing Denied by Supreme Court
July 25, 1938.

I. Fraud ⇨47

In action for fraud inducing purchase of corporate stock, allegation showing ac-

79 P.2d—70

tual value of stock purchased is ordinarily necessary to show plaintiff's damages.

2. Fraud ⇨41

In stockholders' action for fraud inducing purchase of additional stock, petition which alleged fraudulent representations and described conspiracy to deplete corporation's assets, but did not allege specific representations, show value of stock, nor allege that stockholders were induced to purchase stock by the general acts of corporate officers, did not state cause of action for fraud.

3. Corporations ⇨320(4)

Stockholders could not recover from corporate officers and directors for conspiracy to deplete corporate assets by fraud, rendering stock valueless, since right of action was in corporation, though its corporate powers had been suspended for failure to pay franchise tax.

4. Corporations ⇨1

The doctrine that equity will disregard corporate entity when necessary to circumvent fraud and accomplish justice will not be applied where such application would permit stockholders to seize corporate assets and thereby deprive other stockholders and creditors of corporate property in which others were entitled to share.

5. Limitation of actions ⇨100(13)

Where corporation's purchase of realty from bank at allegedly excessive price, together with character and nature of transaction and price paid, were spread upon corporate records in 1926 sufficiently to disclose essential facts, corporation stopped paying dividends in 1928, and directors sold corporate assets and resigned in 1929, stockholders were put on notice of alleged fraud and conspiracy, and hence their suit for fraud and deceit filed in 1933 was barred by three-year statute of limitations, notwithstanding allegations that stockholders did not discover fraud until 1931 or later. Code Civ.Proc. § 338.

6. Limitation of actions ⇨179(2)

In an action seeking relief from fraud, commenced more than three years after perpetration of fraud, plaintiff is held strictly to the rules of pleading, and must allege when and under what circumstances fraud was discovered, and facts showing that plaintiff was not at fault in failing to discover the fraud sooner, and had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Code Civ.Proc. § 338.

7. Fraud $\S$ 338

The policy of the law is to prevent the making of claim for fraud after lapse of many years. Code Civ.Proc. $\S$ 338.

8. Limitation of actions $\S$ 177(3)

It is incumbent upon persons seeking relief from fraud to bring themselves within the exception in statute of limitations providing that cause of action will not be deemed to accrue until fraud is discovered. Code Civ.Proc. $\S$ 338.

9. Pleading $\S$ 243

Where plaintiffs in action for fraud failed to bring themselves within exception of statute of limitations providing that cause of action will not be deemed to accrue until fraud is discovered, after filing five complaints, court properly sustained demurrers to complaint without leave to amend. Code Civ.Proc. $\S$ 338.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Fred W. Nighbert and others against the First National Bank of Bakersfield and others, for damages for fraud and deceit. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Harry G. Henderson, of San Francisco, and Calvin H. Conron, Jr., of Bakersfield, for appellants.

Borton, Petrini & Conron, of Bakersfield, for respondent First Nat. Bank.

Harvey & Johnston, of Bakersfield, for respondent A. C. Hasenjager.

Osborn & Burum, of Bakersfield, for respondents J. J. Sutherland and Dallas Hayes.

Frederick W. Welsh, of Bakersfield, for respondent Rodney L. Turner.

Edward West, of Bakersfield, for respondents Charles L. Taylor and Melvin Hay.

C. E. Arnold, of Bakersfield, for respondents E. E. Holm and P. A. Murray.

Matthew S. Platz, of Bakersfield, for respondent J. P. Shields.

Kendall & Howell, of Bakersfield, for respondents George H. Barnett, Derella B. Taylor, and Lula Mae Shearman.

BARNARD, Presiding Justice.

This is an action for damages for fraud and deceit. The action was commenced on October 24, 1933, and this appeal is from a judgment following an order sustaining general and special demurrers to a fourth amended complaint. This order included the following: "It further appearing that the causes of action, if any ever existed, are barred by the Statute of Limitations, the demurrers are sustained without leave to amend and the action is dismissed."

The complaint in question contains ninety-six causes of action. Except for a variation as to the number of shares purchased and amounts paid by the respective plaintiffs the allegations of the first cause of action are repeated in all of the others, and only the one cause of action need be here mentioned. For the sake of brevity, the defendant the First National Bank of Bakersfield will be herein referred to as the bank, and the defendant The Citizens Land and Loan Company will be referred to as the corporation.

The amended complaint alleges as follows: That at all times therein mentioned the plaintiff has been the owner of 400 shares of common stock and 1,200 shares of preferred stock of the corporation of the par value of \$10 per share. That the bank is a national banking corporation with its principal place of business in Bakersfield. That at all times therein mentioned the corporation, organized under the laws of Delaware, was doing business in California with its principal place of business in Bakersfield, having been qualified to do business in this state on December 4, 1925. That between that date and August 1, 1929, there was issued 56,580 shares of preferred stock and 27,545 shares of common stock, which was sold to its stockholders for \$841,250. That on December 4, 1925, and for a long time prior thereto all of the individual defendants were officers, directors, agents, employees and/or stockholders of the bank. That the plaintiff brings this action in his own behalf and not on behalf of the corporation. That he has made no demand upon the corporation to prosecute this action for the reason that its corporate powers are now suspended since it had failed to pay its franchise tax for more than three years prior to the filing of this complaint.

That on or before December 4, 1925, all of the defendants conspired to defraud the stockholders of the corporation in the sum of \$841,250 and did defraud said stockholders in said amount by fraudulently inducing said stockholders to purchase stock in said corporation in the sum of \$841,250. That the unlawful conspiracy and fraudulent scheme of said defendants consisted as follows, to-wit: That on or before December 4, 1925, the bank through improvident loans made upon certain real properties had so impaired its liquid assets that certain bank examiners threatened to close said bank. That in furtherance of said conspiracy and fraudulent scheme the defendants caused the corporation to be organized under the laws of Delaware and caused certain of these individual defendants to be chosen as its first directors; that these persons were largely interested in the bank, and none of them had substantial investments in the corporation; and that these persons, in furtherance of the conspiracy, caused the corporation to become qualified to do business in California. That on December 18, 1925, the directors of the corporation met and elected officers of said corporation, and that at said meeting and in furtherance of said conspiracy and fraudulent scheme the defendant Holm and the defendant Murray made a written proposal to sell and transfer eleven described parcels of real property to the corporation for \$223,471.41 in cash and 25,000 shares of the common stock of this corporation. That at that time neither Holm nor Murray owned any of said real property and they were, in fact, acting for the bank. That said real properties were not in the aggregate of a reasonable market value to exceed the sum of \$120,000 and were in part encumbered to the extent of \$40,000. That the directors of the corporation voted to accept said offer and to pay for said real property the sum of \$223,471.41 in cash to the bank and to issue 25,000 shares of the common stock of the corporation, thus knowingly and intentionally defrauding the stockholders of that corporation of the sum of \$393,471.41, being the difference between the real market value of said real property and purchase price of the land as above set forth.

That thereafter and prior to April 21, 1926, in pursuance of said conspiracy and fraudulent scheme the directorate of the corporation was increased by adding six members thereto. That on April 10, 1926,

in pursuance of said conspiracy and fraudulent scheme the bank executed two grant deeds purporting to transfer the described real properties to the defendants Holm and Murray; that on the same day Holm and Murray, with their respective wives, executed two grant deeds transferring said properties to the corporation; that at the same time and in pursuance of said conspiracy the president and secretary of the corporation executed a promissory note for \$167,471.41 with interest at 4 per cent. payable to the bank, secured by a deed of trust covering said real properties; and that this note was executed as the balance of the cash consideration for the purchase of said properties, there having been paid to the bank between December 18, 1925 and April 21, 1926 the sum of \$56,000 taken from money paid by the stockholders for shares of stock in the corporation. That the making of each and every one of said instruments was in fact the act of the bank and no one of said instruments was in truth and fact the act of the corporation; that each of said instruments was but a means and device used by said bank and its agents in the furtherance of said conspiracy; that the four deeds above referred to were recorded on May 7 and May 8, 1926; and that the trust deed was acknowledged on April 21, 1926, and recorded in Kern county on October 25, 1929, in Tulare county on October 11, 1929, and in Fresno county on October 14, 1929.

That in furtherance of said conspiracy and fraudulent scheme and in order to provide means for the payment of the 4 per cent. interest called for by said note and trust deed one income property in Bakersfield, known as the "Willis Hotel Property", was included among the parcels of real estate which were thus transferred; that the corporation was at no time able to sell any of the described real property save and except the Willis Hotel property; that the defendant bank well knew when the transfer was made that none of the said real property was salable except the Willis Hotel property; that on May 24, 1928, for the use and benefit of the bank and in pursuance of said conspiracy the corporation, first having obtained the consent of the bank, sold the Willis Hotel property to one Gilbert Beesmyer at an agreed purchase price of \$88,000, which purchase price was paid partly in cash and partly in notes secured by a deed of trust on said property; that said

cash payments and notes were delivered to the bank by said Beesmyer and subsequent payments thereon were made to the bank; that subsequently \$45,000 was paid to the bank by Beesmyer; that in October, 1930, the bank, without the knowledge or consent of the corporation, made an independent adjustment, settlement and contract with the said Beesmyer by and through which the corporation was eliminated from seeming interest in said Willis Hotel property and the proceeds thereof; and that the said defendant bank had the income from said Willis Hotel property at all times.

That from December 4, 1925, to August 2, 1929, the bank, in pursuance of said conspiracy, retained complete control over the corporation; that 50,000 shares of common stock represented all of the voting stock in the corporation; that the bank held 25,000 of such shares and kept control of the corporation by preventing the issuance to others of more than 2,545 shares of said common stock; that by reason of said control the bank caused the note secured by the trust deed to be foreclosed upon all of said real property, including the Willis Hotel property; and that the bank has since held a purported title to all of said property.

It is then alleged that the scheme and conspiracy and fraudulent acts above set forth were not discovered by the plaintiff until after the 22d day of June, 1931, and that the circumstances under which the fraud was discovered were as follows: That during the latter part of the year 1930 and the year 1931, upon the recordation of a notice of default under the terms of said deed of trust, which notice of default was recorded on November 26, 1930, the plaintiff and others employed an attorney and accountant to investigate the affairs of the corporation; that said investigation first concerned itself with the transfer "hereinafter" alleged of the assets of the corporation to the Prudential Holding Company of Los Angeles and said investigation continued until the month of August, 1933, when said investigation was completed, and this plaintiff had his attention first directed to an answer, counterclaim and cross-complaint which had been filed on June 22, 1931, in an action in the United States District Court in which the bank was plaintiff and the corporation and the Prudential Holding Company of Los Angeles were defendants, "which document in substantial form correlated such scheme and design and first called to this plaintiff's at-

tention the fact that these defendants had during all the time set forth in said complaint up to and including the filing of said action last herein mentioned, and working upon a common scheme and/or design calculated to render and in fact rendering plaintiff's purchase of stock as herein set forth valueless from its inception"; that the parties to said action in the federal court had refrained from giving the matter any publicity in the county of Kern or in any way to mention or make public the fact that there existed any such action or any such defense to such alleged action; and that plaintiff is not a party to said action and had no knowledge of the facts pleaded in that action until the same were called to his attention upon the completion of said investigation.

It is then alleged that the individual defendants occupied high positions of trust and confidence in and around the city of Bakersfield; that the people of that city placed explicit faith and confidence in each of them; that these facts were known to the plaintiff and by reason thereof he placed explicit trust and confidence in each of them; that the plaintiff had no reason to doubt the honesty and integrity of these defendants until November 26, 1930, when the notice of default in connection with the trust deed was recorded; and that at all times up to November 26, 1930, in pursuance of said conspiracy the defendants concealed their actions, as follows: (a) by paying dividends on the stock in the corporation on December 31, 1927, March 31, 1928 and June 30, 1928, although no profits then existed out of which such dividends could properly be paid; (b) by withholding the recordation of the trust deed above referred to until December 5, 1929 (this date seems to be an error); (c) by entering into an agreement on August 2, 1929, by which the entire assets of the corporation, save and except its corporate franchise and good will, were transferred to one W. L. McEwan who in turn transferred said assets to the Prudential Holding Company of Los Angeles "and immediately after such transfer said conspiring individual defendants resigned from their respective positions as officers and directors of the Citizens Land & Loan Company".

It is then alleged that, misled by the aforesaid fraudulent acts of the defendants and relying upon the false and fraudulent representations as to the value of the stock, the plaintiff purchased 1,600 shares of stock in the corporation for the sum of

\$16,000 and that by reason of the aforesaid acts of the defendants the plaintiff has been damaged in the sum of \$16,000.

[1,2] The first questions presented are whether a cause of action for damages for fraud is stated by the amended complaint and whether one is stated in favor of these appellants. It is alleged that the respective appellants were stockholders of the corporation at all times referred to in the complaint and while it is alleged that each of them was misled by the fraudulent acts of the defendants into relying upon the false and fraudulent representations as to the value of the stock it is not alleged that any representations as to the value of the stock were made. In fact, it is not alleged that any representation was ever made or to whom or by whom one was ever made. It is neither alleged that the stock was offered as being worth par nor is there any allegation showing the actual value of the stock purchased, which ordinarily is necessary in order to show that the plaintiff has suffered damage. *Guterman v. Gally*, 131 Cal.App. 647, 21 P.2d 1000. There are no allegations of injury proximately resulting from any specific representations and the ordinary requirements of an action for damages based upon fraud and deceit are lacking. See *Colmar v. Pinckard*, 3 Cal.App.2d 213, 39 P.2d 262. The appellants argue that the fraud complained of may be manifested by acts and a course of conduct as well as by spoken misrepresentation. However, the allegation is that these plaintiffs were induced to purchase stock by false representations as to the value thereof without stating what, if any, representations were made and there are neither allegations to the effect that they were induced to purchase stock by the general acts of the defendants nor allegations showing what the stock was actually worth, nor what they received therefrom.

[3] The essence of the complaint seems to be that through a conspiracy with the other defendants the directors of the corporation bought for the corporation certain real property, agreeing to pay more than it was worth, with the preconceived plan that the real property was later to be taken back by the bank through foreclosure of the deed of trust given in part payment therefor, and that the directors of this corporation later transferred all of its assets to a third party, the effect of which transactions was to decrease or de-

stroy the value of the stock held by the plaintiffs. Not only was the value of these parcels of real property, at the time they were transferred from the bank to the corporation, necessarily a matter of opinion but if the allegations of the complaint be deemed sufficient to charge fraudulent acts on the part of the defendants it would seem that this fraud was one against the corporation itself rather than against individual stockholders, and since any fraud in connection with the purchase of these lands by the corporation was made possible by the acts of the directors of that corporation the case would seem to fall within the rules laid down in *Anderson v. Derrick*, 220 Cal. 770, 32 P.2d 1078. In that case the court said (page 1079):

"In the absence of statute, it is the generally accepted rule that misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, as alleged herein, is an injury to the corporation for which it must sue. A stockholder cannot sue for damages because his stock is thereby rendered worthless. [Citing cases.] In the *Niles Case*, supra [*Niles v. New York Cent. & H. R. R. Co.*, 176 N.Y. 119, 68 N.E. 142], as here, the stockholder sought to recover damages at law for the depreciation in the value of his stock, which depreciation, in common with the loss to other stockholders, resulted from the acts of the corporate directors. In denying such relief it is therein declared: 'True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and, if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong, was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock and that of the other stockholders was in consequence of the waste and destruction of the property and franchise of the corporation.' In 13 *Fletcher, Cyc. Corporations*, page 227, section 5913, the principle is stated as follows: 'Individual stockholders cannot sue corporate officers for damages on the ground of mismanagement, on the theory that such mismanagement has rendered their stock of less value or worthless, since the injury is not to them individually, but to the corporation, i. e., the stockholders collectively. * * * It is

only where the injury sustained to one's stock is peculiar to him alone, and does not fall alike upon other stockholders, that he can recover as an individual.'"

[4] It is not alleged here that the rights of creditors or of other stockholders are not involved and it is particularly alleged that each of the plaintiffs brings the action in his own behalf and not on behalf of the corporation. The amended complaint alleges that the plaintiffs had not asked the corporation to prosecute this action since its franchise taxes had not been paid for more than three years. It is not alleged how long this condition had prevailed and this amended complaint was filed on February 1, 1937. In answer to the contention that the cause of action, if any, existed in favor of the corporation and not of the plaintiffs as individuals, the appellants argue that the court should now disregard the corporate entity of the corporation on the theory that the corporation was but the alter ego of the stockholders, and that in such a case equity, when necessary to circumvent fraud and accomplish justice, will disregard the corporate existence. The doctrine referred to has been applied to protect the rights of third persons who have dealt with a corporation or its stockholders under circumstances where it would be inequitable to distinguish between the corporation and its stockholders as separate entities. The doctrine has been employed where a corporation has committed the wrong in order to permit the plaintiff to recover against the party actually responsible, but it has never been applied where the alleged wrong is to the corporation itself and should not be applied where its effect would be to permit a stockholder to seize assets properly belonging to a corporation and thereby deprive other stockholders and creditors of something properly belonging to the corporation and in which they were entitled to share.

[5] Aside from the considerations above suggested we think the trial court's holding that this action was barred by the statute of limitations must be upheld. The main wrong complained of is the selling of certain lands to the corporation for more than they were worth as the result of a conspiracy which included an intention to later take the lands away from the corporation. The selling of the land was completed in April, 1926, and this action was not commenced until October 24, 1933, some seven and one-half years later. There is

an attempt to allege a further fraud on the part of the directors of the corporation in conjunction with the other defendants in that they transferred all of the assets of the corporation to a third party on August 2, 1929, although the terms of that transfer are not disclosed other than through the allegation that the plaintiffs were damaged to the full amount they paid for their stock, which leaves the inference that nothing was received by the corporation through the transfer of these assets. In any event, the first complaint in this action was not filed for more than four years after this transfer of assets. It is conceded that this action is barred by the statute of limitations unless the allegations of the complaint bring it within the exception mentioned in section 338 of the Code of Civil Procedure.

[6] In an action seeking relief from fraud which was commenced more than three years after the perpetration of the fraud the plaintiff is held strictly to the rules of pleading. *Haley v. Santa Fe Land Imp. Co.*, 5 Cal.App.2d 415, 42 P.2d 1078. It is well settled that in such a case the complaint must allege when the fraud was discovered, the circumstances under which it was discovered and facts sufficient to show that the plaintiff is not at fault in failing to discover the fraud sooner, and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. *Original Mining & Milling Co. v. Casad*, 210 Cal. 71, 290 P. 456; *Collins v. Texas Company*, 123 Cal.App. 60, 10 P.2d 773.

Strictly speaking, this complaint fails to allege when the conspiracy and scheme complained of were discovered by the plaintiffs. It is alleged that they were not discovered until after the 22nd day of June, 1931, and the appellants argue that it may be inferred from other allegations that the discovery was made in August, 1933. It may well be doubted whether the circumstances under which this purported fraud was discovered were sufficiently alleged. It is alleged that an investigation was begun after recordation of the notice of default on November 26, 1930, and that the investigation was completed in the month of August, 1933, when the plaintiffs had their attention first directed to an answer, counterclaim and cross-complaint filed in an action in a federal court. While it is alleged that this document in substantial form correlated the scheme and design charged to the defendants and called to the atten-

tion of the plaintiffs the fact that these defendants had been working upon a common scheme or design calculated to render the plaintiffs' purchase of stock valueless from its inception, nothing is alleged other than this conclusion and the facts and circumstances which were thus disclosed to the appellants and which led to the discovery of the fraud are not set forth.

Without further going into these matters we think the complaint fails to allege facts showing that the appellants were not at fault in failing to discover the alleged fraud sooner and that they did not have actual or presumptive knowledge of facts sufficient to put them on inquiry. It is not disputed that the main facts concerning the purchase of these real properties from the bank by this corporation, with the character and nature of the transaction and the price paid, were spread upon the records of the corporation early in 1926, and the contrary is not alleged in the complaint. A cursory examination of the records of the corporation would have disclosed the essential facts as to what lands were being purchased and what price was paid. In *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 45 P. 809, the court said (page 811):

"If there were other stockholders, they were chargeable with knowledge of all the acts of the directors which were spread upon the records of the corporation, and of all the facts connected therewith that the inquiry suggested thereby would have disclosed. Between the time that these transactions were had and the commencement of this action more than three years elapsed, and it is to be presumed that there were three annual meetings of the stockholders during that time, at each of which they could have ascertained all of the facts connected with the release. Whether they did ascertain them, and made no objection thereto, or whether they neglected to inform themselves, is immaterial. They cannot be permitted to question their validity after the lapse of more than three years from the time when they should have ascertained them. Nor can the plaintiff, as their representative, claim that, with such opportunities for ascertaining the facts, it had no opportunity to ascertain them. 'The shareholders of a corporation cannot avoid responsibility for the unauthorized acts of their agent by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time

reap the benefit of their acts in case of success.'"

The county records would have shown the deeds in question and the corporation records would have shown the nature of the transaction as early as April, 1926, including the fact that the note given was payable to the bank. While the deed of trust securing that note was not immediately recorded it was recorded more than the statutory time before this action was brought. Dividends were paid on December 31, 1927 and up to June 30, 1928, and then ceased. The corporation records would presumably have shown whether or not said dividends were properly payable. Not only would the cessation of dividends naturally call for some inquiry on the part of the stockholders as to what was the condition of the corporation but it is affirmatively alleged that on August 2, 1929, the directors of the corporation entered into an agreement for the sale to a third party of all of the assets of the corporation save and except the corporate franchise and good will, and that immediately thereafter those persons resigned their respective positions as officers and directors of the corporation. The transfer of all of the assets of the corporation and the resigning of all its directors was followed by the recording of the trust deed, and all of these events took place more than the statutory time before this action was filed. These facts are extremely suggestive of an unusual situation, and taken in consideration with the preceding facts, including those which were a matter of record on the county records and upon the records of the corporation, were sufficient to at least place the burden of making an inquiry upon the appellants.

[7-9] The facts alleged in the amended complaint not only fail to show that the appellants were not at fault in failing to discover the alleged fraud at an earlier date but rather clearly show actual or presumptive knowledge on their part of facts which should have put them on inquiry and which, if followed up, would necessarily have led to an earlier discovery of the facts in question. While fraud must not be encouraged it is equally the policy of our law to prevent the making of such a claim after the lapse of many years. While an exception is provided for in the statute referred to it was incumbent upon the appellants to bring themselves within that exception and this, in our opinion, they failed to do after filing five complaints. Under

these circumstances the court correctly sustained the demurrers without leave to amend.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



26 Cal.App.2d 637

BROWN v. BROWN.

Civ. 11813.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1938.

As Modified June 10, 1938.

Hearing Denied by Supreme Court
July 25, 1938.

1. Appeal and error ⇐1197

A prior appeal and reversal without directions revested in the trial court authority and jurisdiction to determine whether the decision on the prior appeal was *res judicata*, and the court had jurisdiction of the subject matter, even though the reviewing court was of opinion that the contract on which plaintiff's causes of action were based was void and illegal.

2. Appeal and error ⇐876

On appeal from an order denying a motion to set aside a judgment, presented to trial court long after time for appeal had expired, the question whether the judgment was right or wrong could not be brought before reviewing court.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Zoe Lowe Brown against Herbert Cutler Brown on a property settlement agreement. There was a judgment for plaintiff, and from an order denying his motion for an order to vacate and set aside the judgment, defendant appeals.

Affirmed.

Herbert Cutler Brown, in pro. per.

Carpenter, Babson & Fendler, by Harold A. Fendler, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order of the superior court denying appellant's motion for an order to vacate and set aside a judgment entered against him on December 9, 1936, and is based upon the contention that the lower court did not have jurisdiction over the subject matter embraced within the first cause of action of the complaint for the reason that said first cause of action was founded exclusively upon certain express provisions of an instrument dated February 1, 1919, which had theretofore been adjudged to be illegal and void.

It appears from the record that the plaintiff commenced an action in March, 1932, against this defendant upon a certain property settlement agreement which was entered into between the parties on February 1, 1919. Plaintiff set up and alleged in her complaint five distinct and separate causes of action. Judgment went for defendant and against the plaintiff on the first four counts and in favor of the plaintiff on her fifth cause of action. Defendant appealed from that portion of the judgment in favor of the plaintiff under her fifth cause of action, and no appeal was taken by plaintiff from the judgment relating to the first four causes of action. The District Court of Appeal was of the opinion that the contract on which plaintiff's causes of action were based was void and illegal as being in contravention of good morals and public policy. The decision gave its mandate, "The judgment is reversed," without more. *Brown v. Brown*, 8 Cal.App.2d 364, 47 P.2d 352. Upon the filing of the remittitur, plaintiff moved in the superior court to set the cause for trial upon the issues joined under all of the said five causes of action, and the court granted said motion. Prior to the date fixed for hearing the defendant moved for an order dismissing the said complaint as to the first four counts on the ground that as the plaintiff had not appealed from such portion of the judgment the issues raised thereunder had become final and the court was without jurisdiction or authority to try the same or to make any order relating to an amendment of the causes of action which plaintiff had moved the court to permit. The court made its order granting plaintiff leave to amend her several causes of action. The defendant answered, and judgment was entered in favor of the plaintiff. No appeal was taken from this judgment and time for

appeal has long since expired. Thereafter the defendant moved the court for an order setting aside and vacating a portion of the said judgment, to-wit, that portion thereof which is in words and figures as follows: "It is ordered, adjudged and decreed that the plaintiff Zoe Lowe Brown do have and recover judgment from the defendant Herbert Cutler Brown upon the first cause of action alleged and set forth in her amended and supplemental complaint in the sum of Nine Thousand Eighty (\$9,080.00)." The court denied this order, and it is from the order denying the same that this appeal is taken. The contention of the defendant is that the judgment against the defendant on the second trial is absolutely void and a nullity, quoting 3 American Jurisprudence, section 305, page 67, as follows: "The general rule is that an objection that the trial court had no jurisdiction of the *subject matter* is fatal at any stage of the proceedings, and is not waived by a failure to raise the question in the trial court, but the objection may be raised for the first time in the appellate court."

While the case was pending in the trial court the defendant petitioned the Appellate Court for a writ of prohibition, the defendant contending that the trial court was without jurisdiction of the *subject matter*. What the Appellate Court said on that occasion is enlightening (Brown v. Superior Court, 13 Cal.App.2d 693, 57 P.2d 965, 966): "Under the facts it is claimed by respondent that the plea of a prior judgment as *res judicata* does not oust the trial court of jurisdiction, but must be heard and determined concurrently with all the other issues in the case. We see no answer to this contention. The plea of *res judicata* must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded, either in bar or as an estoppel on some issue, there immediately arise questions as to the identity of the parties, the validity of the judgment as shown by the judgment roll, the

legal effect to be given it, and many other questions. Such matters are primarily for the determination of the trial court, and whether correctly or incorrectly determined it is nevertheless the exercise of jurisdiction over the subject-matter and the parties. This being so, the plea cannot be given the effect of depriving the court of its jurisdiction to hear and determine it with all the other issues in the case. Baird v. Superior Court, 204 Cal. 408, 268 P. 640. Pleas of *res judicata* and estoppel are defensive matter and the superior court has jurisdiction to determine the merits thereof when interposed properly by pleading or proof; and any alleged error in ruling upon such a plea being reversible on appeal, the pleader is not entitled to a writ of prohibition to restrain the superior court from proceeding with the trial of the case when the court has jurisdiction of the parties and the subject-matter of the action. Vitimin Milling Corporation v. Superior Court, 1 Cal.2d 116, 33 P.2d 1016; City of Pasadena v. Superior Court, 92 Cal.App. 523, 268 P. 664; Boulester v. Superior Court, 137 Cal.App. 193, 30 P.2d 59. As stated, any error on the part of the court in its determination of the effect of the prior judgment may be reviewed on appeal."

[1,2] The effect of a prior appeal and reversal without directions is to revest in the trial court authority and jurisdiction to determine whether or not the decision upon the prior appeal is *res judicata*. The court had jurisdiction of the subject-matter. Baird v. Superior Court, 204 Cal. 408, at page 412, 268 P. 640; Vitimin Milling Corporation v. Superior Court, 1 Cal.2d 116, at page 121, 33 P.2d 1016; Pacific States, etc., Co. v. Superior Court, 217 Cal. 517, 19 P.2d 977; Reidy v. Superior Court, 220 Cal. 111, 29 P.2d 780. We are not concerned on the appeal from the order with whether the judgment of the court was right or wrong. That question is not before us. That question cannot be brought before us on an appeal from an order denying a motion to set it aside presented to the court long after the time for appeal had expired.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

26 Cal.App.2d 610

**C. H. PARKER CO., Inc., v. EXETER
REFINING CO.**

Civ. 10446.

District Court of Appeal, First District,
Division 1, California.

May 27, 1938.

1. Appeal and error ☞912

Where defendant's motion for change of venue was denied, on appeal, all conflicts and all reasonable inferences must be resolved in favor of plaintiff.

2. Contracts ☞145

A contract is made at the place where letter of acceptance is mailed, such being the place where the last act necessary to formation of the contract is performed. Civ. Code § 1583.

3. Venue ☞7

Where plaintiff while in Los Angeles offered terms for a contract and defendant in answer made additional proposals, and later plaintiff mailed a letter in San Francisco stating that plaintiff was ready to spend the necessary time and money and was going to prepare to carry out the additional proposals, which letter was answered by a letter from defendant mailed in Los Angeles stating that plaintiff's letter sounded like a confirmation in principle of the possible negotiations, and restated the terms of the contract, the contract was made in San Francisco, and San Francisco county was the proper county in which to institute a suit against the defendant corporation for breach of the contract. Civ.Code, § 1583; Const. art. 12, § 16.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by C. H. Parker Company, Incorporated, against Exeter Refining Company for breach of contract to sell petroleum products. From an order denying defendant's motion for a change of venue, defendant appeals.

Affirmed.

Neil G. McCarroll and Don S. Irwin, both of Los Angeles, for appellant.

Ackerman, Wayland & Mathews, of San Francisco, for respondent.

KNIGHT, Justice.

The defendant corporation appeals from an order denying its motion for a change of venue from the city and county of San Francisco to the county of Los Angeles.

The action is founded on the alleged breach of a contract. The complaint contains two counts, the first for the recovery of damages on account of loss of prospective profits, and the second for the recovery of expenditures alleged to have been made by respondent in connection with the contract.

[1] The respective parties are domestic corporations, and appellant's place of business is in Los Angeles. However, section 16 of article 12 of the Constitution provides that a corporation "may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases". The motion was heard and determined on the allegations of the verified complaint and the affidavits and counter-affidavits of the respective parties; and under well settled rules, all conflicts must be resolved in favor of the prevailing party (*Lakeshore Cattle Co. v. Modoc Land & Livestock Co.*, 108 Cal. 261, 41 P. 472; *Brown v. San Francisco Savings Union*, 122 Cal. 648, 55 P. 598; *Gordon v. Perkins*, 203 Cal. 183, 263 P. 231); and all reasonable inferences which are to be drawn must be in support of the trial court's order. *Marston v. Watson*, 20 Cal. App. 465, 129 P. 611; *Bernou v. Bernou*, 15 Cal.App. 341, 114 P. 1000. If, therefore, the facts upon which the present motion was heard and determined reasonably support the inference that the contract was made in San Francisco, the order denying the motion must be affirmed.

The terms of the contract are set forth fully in the complaint, and briefly stated the circumstances attending the making and the alleged breach thereof, as they appear from said complaint and said affidavits, are these: The appellant was engaged in the business of refining and selling petroleum products, including gasoline, and had its place of business in Los Angeles; and respondent's business was selling and distributing such products throughout the Pacific Northwest. Its place of business was in San Francisco. On July 17, 1935, Har-

ry MacBain, vice-president of respondent company, conferred with appellant's president and vice-president in Los Angeles in an effort to arrange for the purchase of gasoline from appellant for sale and distribution in the Northwest. MacBain was advised that a profitable gasoline deal could not be made, but that if respondent would undertake to develop a market for appellant's other petroleum products, including diesel and fuel oil, appellant would supply respondent for a period of six months with these products and with gasoline. MacBain had no authority to make any agreement except for a supply of gasoline; hence he advised appellant's officers that he would return to San Francisco and lay appellant's plan before his board of directors. He did so, and on July 19, 1935, wrote appellant a letter, which respondent claims constituted a letter of acceptance, and which was mailed in San Francisco. In response thereto and on July 22, 1935, appellant wrote to respondent, stating: "Your letter of July 19 certainly sounds like confirmation in principle of the impression which both you and we had several days ago that it would be possible for us to work out some satisfactory method of doing business." The letter then proceeded to restate the terms and conditions of the contract. Thereupon MacBain went into the Northwest territory to develop the market as agreed, and in doing so expended considerable money. Thereafter and on numerous occasions appellant encouraged respondent to continue to develop the market, which it did, especially in diesel and fuel oil. On September 5, 1935, a conference was held in San Francisco between the officers of the respective parties wherein the president of appellant company reaffirmed the earlier agreement, and thereafter respondent continued to develop the market for appellant's products until September 23, 1935, at which time appellant notified respondent by telegram that it would not carry out the agreement.

[2] It is well settled that a contract is made at the place where the letter of ac-

ceptance is mailed, such being the place where the last act necessary to the formation of the contract is performed (Civ.Code, sec. 1583; *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 P. 855, 65 L.R.A. 90; *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198, 188 P. 1023; *Gas Appliance Sales Co., Inc., v. W. B. Bastian Mfg. Co.*, 87 Cal.App. 301, 262 P. 452); and we are of the opinion that the trial court was justified in concluding that respondent's letter of July 19, 1935 constituted a valid acceptance. In part it was as follows: "At a meeting held yesterday of those interested in the C. H. Parker Co. I presented, to the best of my ability, your situation regarding the disposal, at a better profit to you, of by-products other than gasoline so that you might be able to supply our needs for gasoline. I am happy to report that C. H. Parker Co., Inc., is ready to spend the necessary time and money to dispose of your output of asphalt, diesel and fuel oil, as well as kerosene, and that I am leaving for the Northwest the early part of next week to stay on the ground to accomplish this end."

[3] It is appellant's contention that if any contract was made it came into existence either on July 17, 1935, in Los Angeles county at the time of the conference between MacBain and appellant's officers, or on July 22, 1935, in Los Angeles county by virtue of said letter, mailed in Los Angeles county by appellant to respondent, wherein the terms of the agreement were restated, and which appellant claims constituted an acceptance of the offer. After examining the entire correspondence, however, we are of the opinion that the trial court was justified in concluding to the contrary; and our decision on this issue makes it unnecessary to inquire into the other points urged for reversal. The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

30 Cal.App.2d Supp. 779

HAMMOND v. HOSKINS et al.

No. 92202.

Appellate Department, Superior Court, San
Diego County, California.

May 17, 1938.

1. Exemptions ☞1

Exemptions are creatures of statutes and exceptions to general rule. Code Civ. Proc. § 690 et seq., as added by St.1935, p. 1966 et seq.

2. Exemptions ☞1

Property is not exempt from execution, unless made so by express provision of law. Code Civ.Proc. § 690 et seq., as added by St. 1935, p. 1966 et seq.

3. Exemptions ☞37

The courts are not justified by any assumed legislative policy in adding to statutory list of exemptions. Code Civ.Proc. § 690 et seq., as added by St.1935, p. 1966 et seq.

4. Exemptions ☞4

Legislators are presumed to have understood force and effect of language in exemption statute and contemplated all circumstances rendering it desirable that property not in lists of exemptions be added thereto. Code Civ.Proc. § 690 et seq., as added by St. 1935, p. 1966 et seq.

5. Exemptions ☞4

The court may not make additions to statutory list of exemptions. Code Civ.Proc. § 690 et seq., as added by St.1935, p. 1966 et seq.

6. Exemptions ☞37

A claim of exemption from execution by owner of property of class specifically described or limited in statutory list of exemptions may not include more than declared limitation. Code Civ.Proc. § 690 et seq., as added by St.1935, p. 1966 et seq.

7. Exemptions ☞48(2)

Money earned by Works Progress Administration employee constituted "wages," half of which was exempt from execution on judgment for necessities, consisting of unsatisfied house rent. Code Civ.Proc. § 690.11, as added by St.1935, p. 1966.

[Ed. Note.—For other definitions of "Wages," see Words & Phrases.]

8. Exemptions ☞49

The entire wages of Works Progress Administration employee were not exempt from

execution as "money received as a pension, or retirement or disability or death or other benefit," from United States government by a "pensioner or beneficiary." Code Civ.Proc. § 690.22, as amended by St.1937, p. 1502.

[Ed. Note.—For other definitions of "Beneficiary" and "Pensioner," see Words & Phrases.]

Appeal from Municipal Court, City and County of San Diego; Dean Sherry, Judge.

Supplemental proceedings by J. W. Hammond against Lawrence Hoskins and another on a judgment for necessities. From a judgment discharging defendants, plaintiff appeals.

Reversed.

Liggett & Liggett, of San Diego, for appellant.

B. F. Tyler, of San Diego, for respondents.

TURRENTINE, Judge.

Based on a judgment for necessities, to-wit, House rent, which remained unsatisfied, defendants were cited into court for examination respecting property which they owned and which was subject to execution by court order for the payment of the judgment, and which was not exempt from execution. At the hearing it was established that the defendant Lawrence Hoskins was employed under a Works Progress Administration project at the Eleventh Naval District in San Diego, doing clerical work, and that he received therefor a monthly salary of One Hundred Nine and no/100 Dollars (\$109.00); that at the time of the hearing there was due and unpaid to him on earned wages Twenty-five and 80/100 Dollars (\$25.80). At the conclusion of the hearing plaintiff requested the Court to make an order requiring defendant to return to court at a later date and bring with him and pay to plaintiff one-half (½) of his then earned wages. The trial court refused to make such order and discharged defendant in the supplemental proceedings. Plaintiff prosecutes this appeal.

[1-4] "Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions.

Legislators are presumed to understand the force and effect of the language which is used, and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto." Estate of Brown, 123 Cal. 399, on page 401, 55 P. 1055, 69 Am.St.Rep. 74.

[5, 6] "The court may not make additions to the statutory list of exemptions. Consequently, if the defendant's property is of a class which is so specifically described or limited, his claim of exemption may not include more than the declared limitation." Security-First Nat. Bank v. Pierson, 2 Cal.2d 63 on page 65, 38 P.2d 784, on page 786.

The above quotations are from cases considering and construing Code of Civil Procedure, § 690 and its numerous subdivisions, as added by St.1935, p. 1966 et seq.

[7] It seems to be conceded that the money in question earned by the defendant constitutes wages, and of this we think there can be no doubt. It is also true that the judgment herein is based on a debt for necessities. Consequently one-half (½) thereof is by statute exempt from execution (C.C.P. § 690.11).

[8] Defendant attempts to justify the decision of the lower court holding the entire wages exempt on the following provision of law: "All money received by any person, a resident of the State, as a pension, or retirement or disability or death or other benefit, from the United States Government, or from the State, or any county, city, or city and county, or other political subdivision of the State, or any public trust, or public corporation, or from the governing body of any of them, or from any public board or boards, whether the same shall be in the actual possession of such pensioner or beneficiary, or deposited, loaned or invested by him, is exempt from execution or attachment." Section 690.22, C.C.P., as amended by St.1937, p. 1502.

We do not think that the money earned by defendant comes within this law, for to do so would require us to hold that the money earned was to be received "as a pension or retirement or disability, or death, or other benefit," and to classify defendant as a "pensioner or beneficiary."

It follows that one-half (½) of the wages due defendant are not exempt from execution in this case, and that the trial

court should issue its process, order or power to compel payment thereof to plaintiff.

Judgment reversed.

We concur: HAINES, P. J.; GRIF-FIN, J.



31 Cal.App.2d Supp. 763
F. E. YOUNG CO., Inc., v. FERNSTROM.
No. 92442.

Appellate Department. Superior Court.
San Diego County, California.

June 7, 1938.

1. Judgment ⇨346

A statute authorizing courts to set aside void judgments or orders made explicit a power which superior courts had always had independently of statutory provision. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34.

2. Statutes ⇨212

The Legislature enacting statute authorizing courts to set aside void judgments or orders would be presumed to have known that the power to set aside void judgments was inherent in courts of record. Code Civ. Proc. § 473, as amended by St.1933, p. 1851, § 34.

3. Judgment ⇨346

The reason for enacting statute authorizing courts to set aside void judgments or orders was the probability that the Legislature feared that courts not of record might be held not to possess such power after repeal of statutes authorizing justice courts to set aside void judgments and to relieve against judgments on ground of inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34; §§ 859, 900a; St.1933, p. 1904, § 193.

4. Judgment ⇨386(3)

A motion to vacate judgment not void on its face but void in fact for want of jurisdiction must be made within a reasonable time after rendition of judgment. Code Civ.

Proc. § 473, as amended by St.1933, p. 1851, § 34.

5. Judgment ⇨386(3)

The "reasonable time" within which a motion to vacate judgment not void on its face but void in fact for want of jurisdiction must be made is one year after rendition of judgment, except in the case of bad faith on the part of the process server or person responsible for the actual making of the return of service. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34.

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

6. Courts ⇨189(15)

A defendant's motion made February 28, 1938, to vacate a default judgment entered on December 15, 1933, in the municipal court on ground that defendant was not in fact served with summons was not timely filed, in view of statutory rule that such motion must be made within one year following the entry of the judgment. Code Civ.Proc. § 34, as amended by St.1933, p. 1806, § 2; § 473, as amended by St.1933, p. 1851, § 34.

7. Judgment ⇨456(2)

The statutory rule that a motion to vacate judgment not void on its face but void in fact for want of jurisdiction must be made within one year following entry of judgment does not preclude the seasonable commencement of a suit in equity to set aside a judgment appearing on its face to be good but in fact void, in which case a different limitation of time is applicable. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34.

Appeal from Municipal Court of San Diego; Joe L. Shell, Judge.

Action by the F. E. Young Company, Inc., against L. G. Fernstrom, wherein a money judgment was sought. A judgment in plaintiff's favor by default was entered, and the defendant thereafter moved to vacate the judgment on the ground that he had not in fact been served with summons. From an order of the Municipal Court of the City of San Diego setting aside the judgment as being void, the plaintiff appeals.

Order reversed.

Liggett & Liggett, of San Diego, for appellant.

Ben F. Tyler, of San Diego, for appellee.

HAINES, Presiding Judge.

On November 24, 1933, plaintiff and appellant filed an action against defendant and respondent, in which a money judgment was sought. A writ of attachment against property of the defendant issued. A return of service of the summons was made by the constable of the township, purporting to show such service made on November 25, 1933. No appearance being made, judgment in the plaintiff's favor by default was entered on December 15, 1933, for \$273.31. Apparently the attempted attachment was unfruitful, for executions from time to time issued were returned unsatisfied. On February 28, 1938, defendant and respondent gave notice of a motion to vacate the judgment on the ground that he had not, in fact, been served with summons and was in Arizona on the date of its purported service upon him. This motion was on March 9, 1938, made in the Municipal Court, as the successor of the Justice Court, and, after examining witnesses, the Municipal Court entered an order reciting that the constable had made an erroneous return, due to a mistake in identity, thinking that he had served the defendant when he had not, in consequence of which the Court proceeded to quash the service and set aside the judgment; and on application to it to set aside the order as beyond its power of granting relief, it refused to do so. Thereupon the present appeal from the orders quashing the service and vacating the judgment was taken.

Prior to 1933 the power of Justice Courts to relieve from judgments taken against a party, on the general ground of inadvertence, surprise or excusable neglect was regulated by Section 859, Code of Civil Procedure, which required the application for such relief to be made within ten days after notice of the entry of judgment. It was held that the cognate provisions of Section 473, Code of Civil Procedure, were inapplicable to Justice Courts. *Arbogast v. Superior Court*, 32 Cal.App. 372, 378, 162 P. 909. In 1919 Section 900a, Code of Civil Procedure was enacted, St. 1919, p. 730, providing with respect to Justices of the Peace that: "Said justice shall have power to set aside any void judgment upon motion of either party to the action after notice to the adverse party, and thereupon said action shall be treated as if no judgment had been entered."

Our attention has not been called to any decision adjudicating within what

limit of time such action might in Justice Courts be taken under that section.

In 1933 both Sections 859, Code of Civil Procedure and 900a, Code of Civil Procedure were repealed, St. 1933, p. 1904, § 198, and by amendment to Section 34, Code of Civil Procedure, St. 1933, p. 1806, § 2, the same procedural provisions applicable to Superior Courts were in general made applicable to all trial courts. In the same year Section 473, Code of Civil Procedure, was so amended, St. 1933, p. 1851, § 34, as expressly to provide that: "The court * * * may, on motion of either party after notice to the other party, set aside any void judgment or order."

[1-3] This amendment made explicit a power which Superior Courts had always had independently of Section 473 or of any other statutory provisions. *Richert v. Benson Lumber Co.*, 139 Cal.App. 671, 674, 34 P.2d 840, and many cases cited. The only reason that we can think of, therefore, for writing it expressly into Section 473, is the probability that the legislature, which must be presumed to have known that the power to set aside void judgments was inherent in courts of record, had some fear lest if it were not, after the repeal of Sections 859 and 900a Code of Civil Procedure, placed in some statute, courts not of record might be held not to possess it at all.

[4-6] As applied to Superior Courts, however, it was unquestionably the law prior to 1933, that attacks by motion upon judgments void for want of jurisdiction but not appearing to be void on their faces, must be made within a reasonable time, and the courts were held to be limited in deciding which was a reasonable time, not

under Section 473, Code of Civil Procedure, but by analogy to it, to a maximum of one year after the entry of the judgment except in the single case of actual fraud on the part of the process server in making a false return. See discussion in *Richert v. Benson Lumber Co.*, supra. That having been the settled rule with respect to Superior Court proceedings had prior to the amendment to Section 473 in 1933, we see no reason to believe that the legislature intended to deal with the question of the time within which motions to set aside such judgments might be made, by the amendment. The new language inserted in the section contains nothing purporting to govern the matter. In these circumstances we think the former rule that a reasonable time only should be allowed ought to be held still to prevail, and that, by analogy, to the limit fixed by Section 473 in cases generally where personal service has not been made (as, e. g., in case of service by publication,) that the motion must still be made within the year next following the entry of judgment (except in the case of bad faith on the part of the process server or person responsible for the actual making of the return of service.)

[7] This view does not preclude the seasonable commencement of a suit in equity to set aside a judgment appearing on its face to be good but in fact void, in which case a different limitation of time would apply. *Richert v. Benson Lumber Co.*, supra.

The order appealed from is reversed.

We concur: GRIFFIN, J.; TURRENTINE, J.

CALIFORNIA REPORTER

IN VOLUME

80 PACIFIC REPORTER

SECOND SERIES

11 Cal.2d 376

HOLMES et al. v. HATCH et al.

(two cases).

S. F. 15674, 15736.

Supreme Court of California.

June 2, 1938.

1. Licenses ⇨39

That certificates representing royalty interests in oil well were sold by corporation without permit from Commissioner of Corporations did not preclude assignees of certificates from recovering amount thereof from individual who acquired assets of corporation, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under a new sublease.

2. Appeal and error ⇨1011(1)

It is for the trial court to resolve conflicts in the testimony.

3. Account ⇨19

Where defendant failed to comply with order to account for proceeds from oil well, contending that he received no funds from well and had no books or records which would permit him to account, defendant's offer to account 18 months after order was made, and after defendant had been served with proposed findings and conclusions on which final judgment was to be entered against him, was properly rejected.

4. Mines and minerals ⇨79(7)

In suit for amount of certificates representing royalty interests in oil well against individual who acquired assets of corporation which issued certificates, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under new sublease, where defendant failed to account within a reasonable time after being ordered to do so, trial court properly entered personal judgment against him.

5. Evidence ⇨75

On defendant's refusal to account as directed, court could presume that the evidence, if produced, would operate to defendant's prejudice.

6. Mines and minerals ⇨79(7)

It was not necessary to prosecution of suit for amount of certificates representing royalty interests in oil well, by assignees of certificates against individual who acquired assets of corporation which issued

certificates, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under new sublease, that claims of plaintiffs be first reduced to judgment against corporation.

7. Mines and minerals ⇨79(7)

In suit for amount of certificates representing royalty interests in oil well by assignees of certificates against individual who acquired assets of corporation which issued certificates, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under new sublease, evidence supported findings for plaintiffs.

8. Account ⇨19

Where court filed memorandum opinion and interlocutory judgment ordering accounting, when all the facts were not before the court, neither opinion nor judgment was "final" or binding.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

9. Appeal and error ⇨1151(3)

In suit for amount of certificates representing royalty interests in oil well by assignees of certificates against individual who acquired assets of corporation which issued certificates, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under new sublease, reviewing court would not, on plaintiffs' judgment roll appeal, direct increase of judgment from \$15,000 to \$21,100, the amount prayed for, notwithstanding finding that corporate assets had reasonable market value of \$50,000, in view of possible rights of other creditors and certificate holders, and defendant's refusal to account.

10. Appeal and error ⇨659(4)

In suit for amount of certificates representing royalty interests in oil well by assignees of certificates against individual who acquired assets of corporation which issued certificates, permitted forfeiture of sublease made to corporation, and operated well through "dummy," under new sublease, defendant's motion to incorporate into record judgment roll in another independent suit, which was prosecuted in another county, and wherein other certificate holders recovered only their proportionate share of proceeds from production of well, was denied, where defendant's refusal to account precluded trial court from decreeing that assignees recover their proportionate share.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit by A. S. Holmes and another against Robert E. Hatch and others for the amount of certificates representing royalty interests in an oil well. Named defendant allegedly acquired the assets of the corporation which issued the certificates, permitted forfeiture of a sublease made to the corporation, and operated the well through a "dummy," under a new sublease. From the judgment, all parties appeal, and named defendant moves for "enlargement of the record."

Motion denied, and judgment affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellants.

Robert E. Hatch and Hatch & Mahl, all of San Francisco, for respondents.

PER CURIAM.

We are here confronted with consolidated cross-appeals from a judgment entered in favor of plaintiffs and against the defendant Hatch in the sum of \$15,000. In the briefs filed in support of their judgment roll appeal the plaintiffs request that we direct the trial court to enter judgment for the full amount of \$21,100 prayed for in the complaint, while the defendant upon his appeal, prosecuted under the alternative method, seeks a reversal of the judgment as entered. In passing, it should be stated that the cause was tried as to the defendant Hatch alone and we need not now concern ourselves with the other defendants named in the complaint.

[1] Briefly stated, the record discloses that in December, 1930, a corporation, referred to herein as Hub, Ltd., entered into a sublease or drilling agreement by which it undertook to continue and complete the drilling of a partially sunk oil bore on certain land in the Signal Hill area. As consideration therefor it was to receive 56 per cent. of the oil and gas produced. The lease or drilling agreement contained a forfeiture clause in the event of default by Hub, Ltd., at any time for a period of ten days. In order to finance its operations under the drilling agreement Hub, Ltd., sold to the general public, including plaintiff's several assignors, certificates representing royalty interests in and to the proceeds of

the expected production of the well. Plaintiffs' assignors, with subsequent contributions, invested \$21,100, the amount here in litigation. As indicated, others similarly invested. Unknown to the purchasing public, the certificates representing such royalty interests were sold without first procuring a permit from the commissioner of corporations. This fact, however, is not inimical to the rights of the plaintiffs in this litigation. *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271.

The money so invested by the purchasers of royalty interests proved inadequate to complete the well and place the same on production. It was while Hub, Ltd., was in this plight that the defendant Hatch came on to the scene. His first connection or association with Hub, Ltd., or the well, was in a representative capacity. As counsel for one of the royalty interest purchasers or unit holders, he was engaged to investigate conditions. He soon discovered the uncompleted condition of the well and the financial status of Hub, Ltd. As a result of his association with the officers of Hub, Ltd., and others in charge of the well, he was induced to interest himself personally in the well by advancing money to insure its completion. There is a conflict in the record as to what he was to receive for putting his money into the well. He testified, in substance, that he agreed to invest in the well upon the promise of Allen, the then president of Hub, Ltd., that he would arrange with the unit holders to procure for him a percentage interest in the production of the well when completed. Admittedly nothing came of the asserted endeavor to arrange a percentage interest for the defendant in consideration of his money advances. Allen, on the other hand, testified that as president and director of Hub, Ltd., he attempted to interest the defendant in the well, discussing with him the assets and liabilities of Hub, Ltd., and pointing out to him that the machinery and equipment on hand was worth approximately \$18,000. Allen denied that he discussed or agreed with the defendant that he would communicate with and arrange for the unit holders to grant or contribute to the defendant sufficient units to insure him one-half or any other proportion of the interest Hub, Ltd., had in the production of a completed well. On the contrary, Allen testified that they did not discuss the matter

of his communicating with the unit holders but that in consideration of a transfer of all of the assets of Hub, Ltd., together with a few unsold units or royalty interests, not to exceed six or eight "percents", and worth \$1,500 a "percent", the defendant agreed to and did advance several thousand dollars to complete the well. The witness denied stating to the defendant, as the latter testified, that it was impossible to get financial assistance elsewhere or that if the defendant refused to help, the well would be abandoned.

Allen's testimony in this respect is corroborated by that of Terry, who preceded him as president of Hub, Ltd., in that he testified that in a conversation with the defendant, the defendant's oil expert and admitted agent Young, and Allen, in October, 1931, Young stated that he had made a physical examination of the properties and was satisfied "The territory offered a fair chance of getting a good well", whereupon the defendant inquired as to the number of units or "percents" he would be guaranteed in the event he decided to advance the necessary money to complete the bore and place the well on production. In response to this query, Allen, according to the witness, replied that six and possibly eight "percents" would be furnished. At this same conversation, the witness testified, one of the parties stated that the equipment was worth \$21,000 or more. Hatch agreed to come in. Several days later, the defendant asked the witness to assist Allen in gathering the units that were to make up the six or eight "percents" he was to receive. This witness also testified that the equipment at the well cost "around \$19,000". These two witnesses likewise fixed the market value of the drilling agreement held by Hub, Ltd., as of the time the defendant interested himself in the situation, in excess of \$40,000.

The plaintiff Holmes testified that when talking with the defendant at or about the time the latter was interesting himself in the well, the defendant fixed the value of the equipment at approximately \$15,000. Defendant denied any such statement and offered other testimony that the equipment was worth \$7,500.

As stated above, the defendant agreed to finance the completion of the well whereupon all of the outstanding stock of Hub, Ltd., viz., three qualifying shares, were endorsed in blank and left with the defend-

ant. The resignation of all officers of Hub, Ltd., followed. In a letter addressed to the unit holders in which defendant suggested a reorganization, he pointed out that the oil experts were "optimistic as to the success of this well". A new corporation, referred to herein as Hub corporation, was then formed by the defendant. Defendant was listed on letterheads as the president thereof. Other than the filing of articles of incorporation, nothing was done in the organization of the new corporation. It issued no capital stock. Hub, Ltd., thereupon assigned its drilling contract or sublease to the new corporation, the consideration therefor being the money advanced and to be advanced by the defendant for drilling operations. Thus the assets and equipment of Hub, Ltd., came into the possession and control of the defendant.

Within the next few months the defendant testified that he advanced in the neighborhood of \$50,000, or more, but failing to receive any cooperation from the unit holders in the way of a percentage in the contemplated production, he refused to make further advances. Other than his own assertion, the defendant offered no proof as to the extent of his advances for upon the trial, and here, he frankly states that he has written off the venture as a loss and waives all claim for any and all such advances. Whether for lack of the desired cooperation, or otherwise, the drilling operations terminated in less than three months after the defendant came into the venture. Thereupon and for violation of its forfeiture provisions, the drilling agreement or sublease running to Hub, Ltd., and assigned, as indicated, to the new corporation, was terminated by the lessor. While on the stand, the defendant admitted that though previously in touch with plaintiffs' counsel in an effort to adjust their rights or differences, he did not notify them in December, 1931, that drilling operations had ceased or that there had been a forfeiture under the sublease. He asserts that he was unable to locate the unit holders. Eight days subsequent to the forfeiture of the drilling agreement, a new, and practically identical, drilling agreement or sublease was granted by the lessor to the defendant's brother-in-law, who admittedly was a mere "dummy" in the transaction. Following execution of the new sublease, the defendant concededly made further advances of money which served to

complete the well and to place it on production. Defendant testified that the proceeds derived from the sale of the production of the well were deposited in a trustee account standing in the name of his brother-in-law. At no time during the trial, however, was any effort made by the defendant to account for the production of the well or the proceeds derived therefrom. This matter shall be more fully treated at a later point in this opinion.

Under date of January 2, 1932, the defendant addressed a letter to the unit holders, or those he could locate, in which he reviewed the troubled financial history of the well, the default and forfeiture under the original sublease and the granting of a new sublease to "another party". The letter failed to disclose defendant's relationship or business connection with such other party. He attempted to explain this by stating that he was not the real party in interest but the record fails to support such an explanation. Allen, who was president of Hub, Ltd., when defendant personally interested himself in the well, and the plaintiff Holmes testified, respectively, that they did not learn of the forfeiture under the original sublease until seven or ten days after it had occurred. The former stated that it came out of a "clear sky".

[2] In addition to the conflicts in the testimony herein specifically mentioned, there were others which we find it unnecessary to here discuss. They were matters for the trial court to resolve. Following a protracted trial wherein the history of the well was developed with much more detail than we have here attempted, the trial court, apparently in an effort to do justice to all parties who had put money into the well, by means of a memorandum opinion, intended to guide counsel in the preparation of findings and an interlocutory judgment, indicated that he was of the view that a money judgment should not be entered against defendant, that no actual fraud was committed by the defendant in connection with the taking of the new sublease but that as a result of the taking of such new sublease a trust in the returns from the production of the well existed in favor of all the unit holders and the defendant in proportion to their interests therein. It was then indicated that an accounting was indispensable to a determination of such relative interests and that the interlocutory decree should so provide. As

part of the interlocutory decree entered approximately six months later, it was found, among other things, that the purported transfer of the property and assets of Hub, Ltd., to the successor Hub corporation was of no force and effect because the organization of the latter corporation was never completed and it was therefore without capacity to receive a conveyance; that said property and assets were, and since October 2, 1931, had been, in the sole possession and control of the defendant, who since that time has owned and controlled Hub, Ltd.; that defendant's conduct in the premises has not been motivated by an actual fraudulent intent; and that an accounting was necessary as to the amount of money and property received by defendant from the sale or other disposition of the oil, gas and other petroleum products derived from the well, the amount of money expended by defendant in completing and operating the well, the aggregate sum paid by the unit holders and the amount of unpaid claims. It was thereupon concluded that plaintiffs were entitled to a judgment against the defendant decreeing that as creditors of Hub, Ltd., they were entitled to repayment of their \$21,100 out of a proportionate share of the net proceeds of the production of the well available under the sublease, such proportionate share being expressed by a fraction, the numerator of which was the sum of \$21,100 and the denominator of which was the total of all moneys paid or advanced by all unit holders plus the advancements of defendant for the completion and operation of the well. It was also concluded that the judgment should decree that defendant should "account to plaintiffs, and is indebted to plaintiffs for plaintiffs proportionate share" of the proceeds of the oil, gas and other petroleum products received by the defendant under the sublease, and decreeing that "defendant * * * shall thereafter be liable to plaintiffs and shall account to plaintiffs as Trustee, for plaintiff's proportionate share" as above specified; and "that plaintiffs are entitled to an accounting from defendant", with respect to all moneys or property paid into or received by him from the well. The interlocutory decree thereupon appointed a referee and directed the defendant to "render a full account" as detailed in the findings and conclusions.

One year subsequent to the entry of the interlocutory decree, the trial was reopened pursuant to plaintiffs' motion. Defendant

consented thereto. This was done because of defendant's failure in the interim to account as required and in view of the death of the referee prior to the filing of his report. Upon further proceedings before the court it had been made to appear that a further reference would serve no useful purpose whereupon plaintiffs caused the trial to be reopened "in order to put the case in final shape so that your Honor can now enter whatever decree appears to your Honor to be appropriate" and so that defendant "could present any accounting or figures he might care to present, or so that [plaintiffs] could ask him to do so, if he did not wish to do so voluntarily". At this hearing the defendant in open court waived any and all rights to reimbursement for the advancements made by him. In the ensuing discussions and while again on the witness stand the defendant denied receiving any of the proceeds from the well and stated that he never had or possessed any books or records or the log of the well that would permit him to account.

[3] Approximately six months later and after he had been served with proposed findings of fact and conclusions of law upon which a final judgment was to be entered against him, the defendant moved the court to permit him to produce the records which he had previously failed to do "because of the heavy time and expense which would be entailed to him in getting the necessary data". This tardy offer to account was properly rejected and the motion was denied. Thereafter the court signed and filed its findings of fact and conclusions of law, to which the defendant proposed no amendments, in which in great detail it again traced the history of the well, specifically finding that defendant's conduct and activity in connection therewith was intended to hinder and defraud the creditors of Hub, Ltd., that the defendant conceived the idea and design of causing a default under the sublease or drilling agreement and of the issuance of a new and similar agreement to his dummy or agent, in order that he might thereby be enabled to acquire all of the property and assets formerly belonging to Hub, Ltd., having a market value of \$50,000, and thus extinguish all of the rights of the unit holders, including those of plaintiffs' assignors, for his own sole use and benefit and without making payment therefor or rendering any accounting; that the defendant "has refused to give to this

court any accounting" of the property and assets so acquired or of the production of the well from which "large quantities of oil and gas have been produced"; and that defendant has kept no records of such production or of the proceeds derived therefrom and is unable to account therefor.

[4, 5] We cannot agree with defendant's charge that the judgment is, in effect, a "penalty" judgment imposed solely because of his failure to account and is without any support in the record. Nor can we accept his statement that he neither "wilfully failed nor refused to account while either believing, or having reason to believe, that he was required to do so." During the early stages of the trial and in response to defendant's announced inability to "understand the purpose" of "any talk about an accounting in a suit for money", plaintiffs' counsel stated that in his opinion "there are available two possible different forms of relief which the court conceivably could grant to the plaintiffs", viz., to treat the action as one "at law in which a money judgment against you can be rendered for the amount of our claim at least, to the extent of the value of the assets which you took there, or of which you assumed control of, from Hub Petroleum Corporation, Ltd.", or as an action "for general equitable relief" wherein the court might "entertain the view that this entire situation should be taken up by the four corners and looked at in the larger aspect, and perhaps some accounting should be made that will give some recognition to the money you have put into this thing, and will give some recognition to the money that the plaintiffs have put in". Defendant expressed his appreciation of counsel's explanation. It is thus apparent that defendant during the trial was fully informed as to the likelihood of a money judgment or a judgment for a proportion of the proceeds following an accounting thereof. At the conclusion of the evidence, the court below, as already stated, in an effort to do justice to all concerned suggested in its memorandum opinion that the latter course appeared to be the equitable one for it made due allowance for the investments and advancements of the unit holders and the defendant and in furtherance thereof the interlocutory judgment thereafter entered directed the defendant to account in the particulars mentioned earlier in this opinion. His failure so to do, which we have already recounted, left the trial court no

alternative but to enter a personal judgment against the defendant. Upon defendant's refusal to account as directed, the court might well presume that the evidence, if produced, would operate to his prejudice. *Bone v. Hayes*, 154 Cal. 759, 765, 99 P. 172. In *Wright v. Salzberger*, 121 Cal.App. 639, 644, 9 P.2d 860, 862, it is declared that "Where property alleged to have been fraudulently conveyed is shown to have been sold by the grantee or converted to his own use a personal judgment for the value thereof may be entered". See, also, *Swinford v. Rogers*, 23 Cal. 233, 234, 237.

[6, 7] Contrary to the defendant's contention, we are satisfied that the complaint states a cause of action. It was not necessary that plaintiffs' claims be first reduced to judgment against Hub, Ltd. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 532-534, 30 P. 765, 29 Am.St.Rep. 149. We are likewise satisfied that the evidence supports the findings. In fact, defendant's assaults on the findings and the evidence underlying them are, to say the least, most general and indefinite and are advanced with but slight reference to the record.

[8] The presence of certain inconsistencies in defendant's testimony, not necessary to be here detailed, coupled with his later refusal or neglect to account as directed, when considered with the further fact that the trial was reopened, by agreement of counsel, for the taking of additional evidence, at which further hearing the defendant for the first time asserted that he was not the real party in interest but that there had been put into the well certain of the money of Young, his previously admitted agent, which testimony was contrary to defendant's earlier testimony that the money advanced was his "own personal funds", and finally when it is recalled that the defendant offered to produce the records, etc., when served with proposed findings and confronted with the spectre of a final judgment against him, we have no hesitancy in stating that the court below acted reasonably and within the record when it concluded, in the interim between the entry of the interlocutory judgment and the final judgment, that defendant in his acquisition of the assets of Hub, Ltd., was not motivated by the high ideals originally attributed to him. In other words, all the facts were not before the trial court at the time it filed its memorandum opinion and its interlocutory judgment. Under all

of these circumstances, neither was final nor binding. *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 595, 77 P. 1113; *Wadleigh v. Phelps*, 149 Cal. 627, 645, 87 P. 93; *Doudell v. Shoo*, 159 Cal. 448, 454, 114 P. 579; *Gunder v. Gunder*, 208 Cal. 559, 561, 282 P. 794. In the recent case of *McAllen v. Souza*, Cal.App., 74 P.2d 853, hearing denied here, it is stated (page 855): "We are dealing here with an interlocutory judgment ordering an accounting which differs from certain other types of interlocutory judgments known to the law. The interlocutory judgment here was not final in any sense of the word. * * * It required no findings to support it * * * and any findings or conclusions made at the time of the entry thereof were subject to change or modification at the time of entry of the final judgment."

[9] We are not inclined, upon plaintiffs' judgment roll appeal, to direct the court below to increase the judgment from \$15,000 as entered to \$21,100, the amount prayed for in the complaint. While it is true the court found that the assets of Hub, Ltd., had a reasonable market value of \$50,000, it may well have concluded, when confronted with defendant's refusal to account, and with due deference to other creditors and unit holders not before it, that plaintiffs under all of the circumstances disclosed by the record, should have judgment for a part only of their claim.

[10] We address ourselves now to defendant's motion for "enlargement of record", which motion was made after submission of these cross-appeals. By his motion the defendant seeks to have incorporated into the record now before us the judgment roll in another action, prosecuted in another county, by unit holders other than those now before us. He seeks to include the same on the ground that though the causes assertedly involve identical issues they present irreconcilable judgments. We have been furnished with the judgment roll alone in the cause sought to be incorporated. The evidence there adduced is not now before us and we perceive of no good reason why the cause of the plaintiffs herein should be influenced or governed by the ability or lack of ability of persons similarly situated to prosecute their claims against the defendant. It might be said that it was defendant's refusal to account that pre-

**NOLAND v. SUPERIOR COURT IN AND
FOR VENTURA COUNTY et al.**

Civ. 11802.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1938.

Rehearing Denied June 24, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

1. Prohibition ☞18

If the question of the jurisdiction of an inferior court has been raised by an appropriate objection, an appellate court will not issue a writ of prohibition to restrain further proceedings in the lower court until the inferior court has ruled upon the question which has been presented for its determination.

2. Prohibition ☞18

Where husband instituted proceedings in superior court for modification of wife's foreign divorce decree, and when order to show cause, which had issued pursuant to husband's proceeding, was called for hearing, husband moved to dismiss the order on ground that court lacked jurisdiction, and it was admitted, on husband's application for writ of prohibition to restrain superior court from hearing the order to show cause, that husband's motion was under submission and still pending, husband was not entitled to writ.

Original application for a writ of prohibition by William Doster Noland to restrain the Superior Court of the state of California in and for Ventura County and Louis C. Drapeau, judge thereof, from proceeding to hear an order to show cause relative to the modification of the provisions in a divorce decree pertaining to the custody of petitioner's minor child.

Writ denied.

Lin Price, of Los Angeles, for petitioner.

Louis C. Drapeau, of Ventura, for respondents.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent Superior Court from proceeding to hear an order to show cause relative to the modification of the provisions in a divorce decree pertaining to the custody of a minor child.

The essential facts are:

December 15, 1934, Vyola Bubb Noland, wife of petitioner, obtained in the state

cluded the trial court in the present cause from entering a judgment for the plaintiffs, as in the other case, for their proportionate share only of the proceeds derived from the production of the well. In the cause sought to be incorporated the subject was covered by stipulation of the parties. The two causes are not dependent one on the other, as was the situation in *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann.Cas. 1915B, 645, relied on by the defendant. As pointed out in the cited case (page 705), the judgment there sought to be incorporated "was the sole foundation of plaintiff's action". Such is not the situation here presented. Plaintiffs' action and judgment are self-sufficient and may stand regardless of the prosecution by other unit holders of their claims. In addition, the motion to incorporate is slightly at variance with defendant's statement made early in the trial that he looked upon the present cause, which antedates the one now sought to be incorporated herein, "as a sort of test case which will be very useful in determining the rights of not only the parties to the immediate action, but other interest holders". Moreover, the rule of the *Sewell Case*, supra, relied on by the defendant, is one of "expediency, to be applied or refused application as the equities and justice of the cases require". *City of Los Angeles v. Abbott*, 217 Cal. 184, 193, 17 P.2d 993, 995. Inasmuch as the defendant's refusal to account precluded the trial court from decreeing that plaintiffs recover their proportionate share of the proceeds of the production of the well from the defendant, as trustee thereof, as was decreed in the cause sought to be incorporated, and inasmuch as the defendant in challenging the propriety of this form of relief, as suggested by the trial court herein in its memorandum opinion, declares in his opening brief herein "that the proposed trust was illegal", we fail to perceive wherein the equities or justice of the situation make it expedient for us to now give heed to the findings and judgment of another court, in a different action, between different parties, wherein such asserted "illegal" form of relief was granted.

We have noted other contentions of the parties. They do not require discussion here. What we have said sufficiently disposes of the appeals. Defendant's motion for a new trial was properly denied.

The motion for "enlargement of record" is denied and the judgment is affirmed.

In re BURNS' ESTATE.

DODGE et al. v. BOLTON et al.

Civ. 11596.

District Court of Appeal, Second District,
Division 1, California.

June 3, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

of Nevada a decree of divorce from petitioner, which decree awarded the custody of a minor child of the parties to petitioner's wife, giving to petitioner the right to visit and see the child at all reasonable times. October 3, 1935, petitioner instituted a proceeding before respondent Superior Court, asking for a modification of the Nevada divorce decree in certain particulars relative to the custody of the child of the parties. December 23, 1937, petitioner in the state of Nevada obtained an order modifying the decree of divorce to provide that the custody of the minor child should be awarded to him with the right of the child's mother to see the child at certain specified times. December 27, 1937, petitioner's wife obtained an ex parte restraining order from respondent Superior Court restraining petitioner from taking their minor son from her.

February 7, 1938, the order to show cause issued October 3, 1935, was called for hearing before respondent court, at which time petitioner made a motion to dismiss the order to show cause on the ground that the court was without jurisdiction to hear the matter. Respondent's answer to the petition filed in this court alleges that petitioner's motion was taken under submission and is still pending and undecided before respondent court. This latter fact was admitted on the argument before us.

This is the sole question to determine:

If the question of an inferior court's jurisdiction has been raised by an appropriate objection and remains undetermined in said court, will a writ of prohibition issue to restrain said court from taking further proceedings in the case before it?

[1] This question must be answered in the negative. The law is settled that, if the question of the jurisdiction of an inferior court has been raised by an appropriate objection, an appellate court will not issue a writ of prohibition to restrain further proceedings in the lower court until the inferior court has ruled upon the question which has been presented for its determination. *Chester v. Colby*, 52 Cal. 516, 517; 21 Cal.Jur. [1925] 628; 50 Cor. Jur. [1930] 697.

[2] For the foregoing reasons the application for a writ of prohibition is denied and the alternative writ heretofore issued is discharged.

We concur: CRAIL, P. J.; WOOD, J.

1. Trial $\hookrightarrow$ 142

A nonsuit or directed verdict may be granted only when, disregarding fact of conflict in evidence, giving full credit only to evidence tending to support allegations of complaint, whether produced by plaintiff or defendant, and indulging in every legitimate inference from such evidence, there is no evidence sufficiently substantial to support verdict for plaintiff.

2. Wills $\hookrightarrow$ 1

Testator's property is his to dispose of as he wills, and he is not called on to consult or satisfy wishes or views of juries or courts. Probate Code, § 20.

3. Wills, $\hookrightarrow$ 155(1)

A will may not be held invalid on ground of undue influence, however unnatural and at variance with testator's expressions as to his intentions regarding his relatives or natural objects of his bounty it may appear to be, in absence of actual showing of some sort of pressure which overpowered testator's mind and mastered his volition at very moment of will's execution.

4. Wills $\hookrightarrow$ 163(2)

One unduly profiting as beneficiary under, and actually participating in procuring execution of, will by one to whom former sustained confidential relation, has burden of showing that will was not induced by coercion or fraud in contest thereof.

5. Wills $\hookrightarrow$ 163(2)

A presumption of undue influence arises from proof of confidential relation between testator and beneficiary unduly profiting by will, coupled with activity on latter's part in preparation thereof.

6. Evidence $\hookrightarrow$ 591

Will contestants were entitled to rely solely on such portion of evidence, elicited on their examination of adverse witnesses, as was favorable to their claim, and were not bound by such witnesses' adverse testimony. Code Civ.Proc. § 2055.

7. Wills ⚡163(1)

The burden was on will contestants to show that will was not executed entirely of testatrix' own free will without influence or coercion by beneficiaries.

8. Wills ⚡163(1)

To overthrow will on ground of undue influence, contestant must prove not merely circumstances consistent with exercise of such influence, but circumstances inconsistent with voluntary action by testatrix.

9. Wills ⚡324(3)

Evidence in will contest *held* insufficient to take to jury question whether certain beneficiaries exercised such undue influence over testatrix as in effect destroyed her free agency and overwhelmed her volition at time of making will.

10. Wills ⚡15

The statute limiting amount of charitable devises and bequests is violated only by devise or bequest shown to be excessive when it takes effect, and fact that charitable bequests may be ascertained to be excessive in future is insufficient to warrant conclusion that they are excessive and hence invalid so as to entitle residuary legatee to portion thereof. Probate Code, §§ 41, 43.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by Alvan M. Dodge and others against Ivan A. Bolton and others to contest the will of Clara Northway Burns, deceased. Judgment for defendants, and petitioners appeal.

Affirmed.

Lee T. Mullen, Claude A. Shutt, Zach Lamar Cobb, and Earl A. Littlejohns, all of Los Angeles, for appellants.

Hewlings Mumper, Clifford E. Hughes, and Baldwin Robertson, all of Los Angeles, for respondents Edwin A. Meserve, as executor named in last will and testament of Clara Northway Burns, deceased; Edwin A. Meserve, M. H. S. Bannister, sometimes known as Mrs. John C. Bannister; Nellie J. Stone, Lottie Grinsted, Grace Bowers, Grace Murray, Margaret Burns Malley, Mrs. A. S. Hill, sometimes known as Vyne Bowers Hill; Shirley E. Meserve, Hugh Nawn and British Old People's Home, a corporation.

Hervey & Hervey, of Los Angeles, for respondent Ivan A. Bolton.

Overton, Lyman & Plumb, and Cecil A. Borden, all of Los Angeles, for respondents trustees of Hollenbeck Home.

WHITE, Justice.

Certain of the heirs of Clara Northway Burns, deceased, contested her will after probate, and they appeal from a judgment against them following the granting of proponents' motion for nonsuit.

By her will, dated September 13, 1934, Clara Northway Burns sought to dispose of an estate valued at approximately a half million dollars. Under the terms of her will, decedent bequeathed the sum of \$7,500 in \$1,500 bequests to each of five friends. With the exception of a diamond ring and pin given to second cousins, her jewelry and other personal effects were bequeathed to friends, as were her home and the furnishings therein, which went to Ivan A. Bolton, a young lawyer friend of the decedent, who had resided in her home for some two years. All of her remaining property, of every kind and character, was devised and bequeathed to Edwin A. Meserve and Shirley E. Meserve and the survivor of them, in trust, without bond from either, with the direction that one-quarter of the net income should be paid in monthly instalments to Hugh Nawn during his natural life and the other three-fourths of the net income from said trust to be paid each year to Ivan A. Bolton during his natural life in monthly instalments. The will then directed that in the event Hugh Nawn or Ivan A. Bolton should die, then the entire net income from the trust should be paid to the survivor, and upon the said survivor's death the trust should terminate and \$1,000 therefrom should be paid to the British Old People's Home, a charitable institution, while all the rest and residue of the trust estate should be paid to the Hollenbeck Home, a charitable institution. Then followed paragraph nine of the will, reading as follows:

"If any of my property be undisposed of by the foregoing will by reason of any construction of the will, or because any provision thereof is contrary to law, or through any legacy or trust provision lapsing, or from any other cause, then I devise and bequeath such otherwise undisposed of property to Edwin A. Meserve."

By the terms of the will, Edwin A. Meserve was appointed executor without bond, with the added provision that in the event of his death, refusal to act, or resig-

nation, his son, Shirley E. Meserve, should be the sole executor, without bond.

[1] In *Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768, so often referred to with reference to the power of the court to grant a nonsuit, we find the following language: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" (Citing cases.) The expression, "disregarding conflicting evidence", obviously means to only disregard the fact that there is a conflict in the evidence and give full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff's complaint.

The record discloses the following:

Petitioners in this will contest were first cousins of the decedent. With the exception of petitioner Lillie L. Dodge, there had been no communication between petitioners and the decedent over a long period of years. In the case of petitioner Lillie L. Dodge there were admitted in evidence two letters addressed by the decedent to Lillie L. Dodge under date of April 6, 1932, and March 16, 1933, both of which bore the salutation, "Dear Lillie," the first being signed, "Lovingly, Clara," while the second concluded with the words, "Love, Clara." Defendant and respondent Edwin A. Meserve is and for many years had been a licensed and practicing attorney in Los Angeles; he first met the decedent, Clara Burns, about thirty or forty years ago, at which time she was the wife of John Johnston; following their first meeting they became good friends, and he acted as her attorney until the time of her death, at which time she was of the age of seventy years. It also appears that Mr. Meserve acted as Mr. Johnston's attorney and upon his death probated his will. Some time following Johnston's death, decedent married James P. Burns, who died during January, 1928, and Mr. Meserve and his associates also acted as attorneys for the decedent in probating Mr. Burns' will. It was testified by a physician that he treated decedent professionally from August to October, 1927, when she suffered from an affliction commonly known as

shingles, a disease which primarily involves the nerves just outside of their origin in the spinal cord; that while he was treating decedent in 1927 she suffered from a severe physical illness and "most of the time she was in a mentally confused condition, didn't know where she was". The evidence then discloses that some months after this illness, and about one month after the death of her husband, Mr. Burns, and during the course of the probate proceedings involving the latter's will, Mr. Meserve drew decedent's will, dated February 10, 1928, in which the clause making Mr. Meserve residuary legatee was originally incorporated. The decedent made four subsequent wills, respectively in 1930, 1932, 1933, and the final will, now before us, on September 13, 1934. She also executed a codicil to her will during March, 1934. Each of said wills brought forward the clause of the 1928 will making Mr. Meserve residuary legatee. With reference to said clause, the only evidence is that elicited from Mr. Meserve under section 2055 of the Code of Civil Procedure, and this disclosed that Mr. Meserve advised the decedent that "if and when that will was probated it should be determined that more than the statutory permitted value was going to charity, that on a distribution her heirs could contest that disposition. I explained to her the theory of precatory trusts, told her that she ought to select some person in whom she had—that she knew to whom she would explain everything that she wanted, but must be very careful not to exact from that party any promise that they would do anything or that they would carry out her wishes, leaving it to the conscience alone of that party to do with that property as he or she saw fit. I also stated to her that if there were such a provision in the will that then in all probability no one would contest the proceedings for distribution claiming there was a disposition to charity over and above that allowed by law for the reason that if they contested it and contested it successfully, it would pass to that party and not to the contestant. I had drawn the will with a complete line left blank, and I said, 'Take this will and think it all out and then when you have selected the party to whom you want that to go write that name in with your own handwriting.' She later brought that will in with my name written in her own handwriting on the one line that was left blank for that purpose. * * * I had suggested to her two different names, Mr. E. S. Pauly, vice president of the First National

Bank, and Mr. Jay Spence, the then vice president of the bank on Sixth and Springs Streets, as being the parties who were very intimate business friends of hers as well as socially. I had told her that I didn't want her to select my own name at that time, calling her attention to the fact that she had previously stated that she wanted to leave me the larger part of her estate, and I told her that that could not be done; that I would not permit it. Then with that explanation she executed the will of 1928."

With reference to the execution of the last will, the only evidence pertaining thereto indicates that Mr. Edwin A. Meserve was not present when the decedent signed it; that Mr. Meserve was engaged in connection with some litigation in Pomona; that while he was so engaged, decedent came to see him, saying, "I want to make a number of changes in my will", to which Mr. Meserve replied, "That is all right, Clara, you have been doing that right along." Mr. Meserve testified then as follows: "I said, 'I haven't time to take this down and I want you to take this copy and write it out in your own handwriting. I am going to copy that, whatever changes you make on this will. You are competent to make them, and you write it out in your own handwriting, you bring it in and Miss Phillips (one of Mr. Meserve's secretaries) will copy it. She will then, if I am not here, will then submit it to someone, some lawyer in the office, who will go over it to see that the things that you have changed have been properly incorporated in your new will, and then will supervise the execution of the will.' She said, 'Well, if you are not here to supervise the execution of that will—I would be more—I want Shirley (an attorney, and son of Edwin A. Meserve) to do it.'"

With reference to the execution of the last-named will, the only evidence in the record indicates that decedent came to the office of Mr. Meserve, who was absent therefrom, whereupon the decedent consulted the above mentioned Mr. Shirley E. Meserve, and the will was thereupon executed, with Mr. Shirley E. Meserve and the legal secretary, Miss A. Phillips, acting as witnesses thereto.

With reference to the relationship existing between the decedent and the defendant and respondent Ivan A. Bolton, it appears that the latter was introduced to the decedent by a friend in 1932, and the following year Mr. Bolton went to live at the home of

decedent. With reference to decedent's attitude toward Mr. Bolton, Mr. Edwin A. Meserve testified, "She told me that Mr. Bolton was a lawyer, had been admitted to practice law; that he was down and out, and she thought that if she helped him get an office and start him as a lawyer that he would put his feet on the ground and probably succeed. She told me that he seemed never to have quite gotten his feet on the ground after he was gassed in the war and that she thought that if she helped him that he would succeed as a lawyer. * * * Some time after that Mrs. Burns in speaking of Bolton said that he had been to her more like a son than any person that she had ever known; that he had treated her with great respect; that he had gone on trips with her and Mr. and Mrs. Bannister, and with her and Mrs.—I can't think of her name for the moment—Kroening, gone on trips and had always helped her, had taken charge of seeing that the rooms were provided and that things were done, and she said that he had been to her a very helpful son and she was very much in hopes that he was going to make a go of it."

There was also testimony in the record that before Bolton came to live at the home of decedent, the latter had many friends visiting her and entertained frequently, but that Bolton objected to her friends' coming, and that thereafter such visits became more infrequent. The record also contains testimony to the effect that during November, 1934, an argument ensued between Bolton and the decedent pertaining to a Christmas celebration to which the decedent had been in the habit of inviting many of her friends, and that Bolton said to the decedent, "No, we won't have that party. I am not going to have all those old hens around me at Christmas. If we are going to have a party, I am going to give out the invitations." It was also in evidence that Bolton had received from the decedent some \$11,000 during the two-year period from January, 1933, to December, 1934. There was also testimony to the effect that Bolton frequently complained to the decedent that he was crippled by arthritis and could hardly walk, and he would walk in a crippled manner when in the presence of decedent, but would walk all right when he was out of her presence.

Further testimony was to the effect that during her lifetime and particularly about October, 1934, decedent complained of the treatment accorded her by Bolton; that upon an occasion when Mrs. Burns expressed a desire to go down and talk with Attorney

Meserve about her will, Mr. Bolton suggested that someone else could do it, but that the decedent insisted she wanted Mr. Meserve. Another witness testified to statements on the part of Mr. Bolton in which he expressed a desire to obtain the house in which decedent was living, and that he was continually talking about decedent dying. A nurse who attended the decedent during her last illness, from December 5, 1934, until her death on January 7, testified that the decedent asked the nurse to get in touch with Attorney Meserve because decedent wanted "to rectify the mistake that she had made to her relatives in the east". The witness testified that in compliance with this request she went downstairs to use the telephone, but Bolton was using the telephone and told her, "If there is any phoning to be done at this time, I am the boss around here, and the one who will do it".

With this statement of the evidence as contained in the record, we proceed to a discussion of appellants' claim that the evidence they produced established a prima facie case of undue influence in the making of decedent's will, by reason of which the trial court fell into error in granting a nonsuit thereon.

[2] Reviewing the question of the sufficiency of the evidence to sustain the judgment of nonsuit in the light of settled and established legal principles, we are confronted first of all with the fact that every person of sound mind over the age of eighteen years may dispose of his separate property by will. Prob.Code, sec. 20. As was said in an especially well-considered opinion prepared by Mr. Presiding Justice Nourse of Division Two of the First Appellate District in the Matter of Estate of Nolan, 78 P.2d 456, 457, "the property of the testator is his to dispose of as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts (Estate of Spencer, 96 Cal. 448, 452, 31 P. 453; Estate of Perkins, 195 Cal. 699, 709, 235 P. 45); and 'whether in the minds of others a will is just or unjust is a matter of opinion, and to permit a jury to determine the question without that substantial evidence which the law requires would be to permit a jury to make the disposition irrespective of the desires of a testator.' Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816."

[3] Appellants' first claim, that the will was executed under the undue influence of
80 P.2d—6

respondent Attorney Edwin A. Meserve, is without any merit whatever. The authorities in this state are numerous to the effect that however unnatural a will may appear to be, and however much at variance with expressions by the testator as to his intentions with regard to relatives or the natural objects of his bounty, it may not be held invalid on the ground of undue influence unless there be an actual showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution. See Estate of Clark, 170 Cal. 418, 424, 149 P. 828; Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; Estate of Gleason, 164 Cal. 756, 765, 130 P. 872; Estate of Lavinburg, 161 Cal. 536, 119 P. 915.

[4-6] This is the settled general rule. There is a well-established exception to this rule, upon which the contestants rely here, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. As suggested in Estate of Higgins, 156 Cal. 257, 261, 104 P. 6, 8, a "presumption of undue influence" arises from proof of the existence of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will". However, the confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will. See, in this connection, Estate of Ricks, 160 Cal. 450, 117 P. 532; Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915; Estate of Higgins, supra; Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459. The whole claim of contestants in this connection is that there was such activity on the part of respondents Edwin A. Meserve and Ivan A. Bolton, but there is no evidence in the record to support this contention. As to respondent Edwin A. Meserve, there is not even a scintilla of such evidence. In fact, the testimony points clearly to the absence of any such activity on Mr. Meserve's part. True, some of this evidence was elicited under section 2055 of the Code of Civil Procedure, and contestants were entitled to rely only upon that portion of such evidence as was favorable to their claim and were not bound by any adverse testimony given

by witnesses called under that section. But nevertheless, such testimony remained in the record and was uncontradicted.

[7-9] We may assume for the purposes of this decision that there was a sufficient *prima facie* showing to satisfy the law of the existence of a confidential relation between the decedent and her attorney Edwin A. Meserve, as well as between the decedent and Ivan A. Bolton, in connection with the latter of whom the evidence indicates there was a relationship characterized by the testatrix as that of foster-mother and foster-son; and we may assume that Attorney Meserve did participate in procuring the execution of the original and subsequent wills down to the one before us; but the record is absolutely destitute of any evidence of such activity on the part of Attorney Meserve in connection with the execution of the last will which was offered for probate. As to respondent Bolton, much, if not all of his conduct and activity against which complaint is lodged occurred months after the execution of the will here in question. There is nothing in the record before us inconsistent with the idea that the testatrix executed the will here in controversy without any previous suggestion of such action by any one, and entirely of her own free will, without influence or coercion of any kind. The burden was on the contestants to show the contrary, and it is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but before a will can be overthrown, the circumstances must be inconsistent with voluntary action on the part of the testatrix. *Estate of Morcel*, 162 Cal. 188, 121 P. 733; *Estate of Donovan*, 114 Cal.App. 228, 299 P. 816. See, also, *Estate of Presho*, 196 Cal. 639, 238 P. 944, and *Estate of McDevitt*, *supra*. The evidence in this case, when weighed by the standard here enunciated, falls far short of showing any such undue influence as in effect destroyed the testatrix' free agency and overwhelmed her volition at the time of making the will with which we are here concerned.

[10] In asserting that respondent Edwin A. Meserve profited unduly under the terms of the will, appellants lay particular stress upon their claim that the charitable devises and bequests violated the provisions of sections 41 and 43 of the Probate Code, and that therefore the estate in excess of that which may legally be given to charitable institutions would go to respondent

Meserve. Without indulging in mathematical computations, it is sufficient to say that the statute against charitable devises and bequests can be violated only when the devise or bequest takes effect, and at that time is shown to be illegal for excess (*Estate of Campbell*, 175 Cal. 345, 165 P. 931); and the fact that the attempted charitable bequests may in the future be ascertained to be excessive under the statute is not sufficient to warrant a present conclusion upon our part that they are excessive and therefore invalid, and that consequently the residuary legatee succeeds to a portion thereof.

Conceding as appellants do in their brief, that the sole question involved on this appeal is whether the evidence produced by them established a *prima facie* case of undue influence in the making of decedent's will, it follows from what we have said that a verdict in favor of contestants could not have been held to have sufficient support in the evidence, and that the trial court did not err in granting the motion for a nonsuit.

Judgment affirmed.

We concur: YORK, P. J.; DORAN, J.



27 Cal.App.2d 44
In re BRUCE'S ESTATE.

BRUCE v. OWEN et al.

Civ. 2218.

District Court of Appeal, Fourth District,
California.

June 7, 1938.

I. Wills ⚔743

Evidence warranted decree distributing residuary estate to residuary legatee after payment to finance company's assignee of legatee's indebtedness to finance company, on ground that residuary legatee had assigned her estate to finance company as security for payment of indebtedness, and had not made an absolute assignment of all her interest in estate to finance company.

2. Wills ⚡743

Whether a residuary legatee has made a verbal assignment of residuary estate is ordinarily a question of fact.

provide for the repayment to her brother of the amount for which he obligated himself to the finance company in taking the assignment.

3. Wills ⚡744

A decree distributing residuary estate in equal shares to the three residuary legatees with the provision that assignee of finance company to which one legatee had assigned her share as security for payment of debt owing finance company should be paid the amount of the indebtedness out of such legatee's share merely provided for payment of the debt and did not effect a foreclosure of the security without any proceedings appropriate to a foreclosure, where the indebtedness could be settled in cash and the assignee submitted to the probate court the question of his right to such legatee's share of the estate.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Proceeding in the matter of the estate of H. S. Bruce, deceased, wherein Orpha E. Owen and Mary Elizabeth Pringey filed a petition for distribution of the estate. The petition was opposed by Lewis Bruce, executor. From the decree of distribution, the executor appeals.

Affirmed.

John Preston King, of Lindsay, for executor and appellant.

Clarence H. Wilson, of Hanford, for petitioners and respondents.

4. Estoppel ⚡92(1)

The rules that the voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting, and that he who takes the benefit must bear the burden, are rules of equity, and must be given a reasonable interpretation. Civ.Code §§ 1589, 3521.

HAINES, Justice pro tem.

This is an appeal by Lewis Bruce from the decree of distribution made on June 20, 1937, in the matter of the estate of his father, H. S. Bruce, which will be hereinafter referred to as "the estate". The decedent left a will in which three of his children, appellant Lewis Bruce, hereinafter referred to as "Dr. Bruce", Mary Elizabeth Pringey and Orpha E. Owen, the latter two of whom are respondents here, were made residuary legatees. Dr. Bruce and one Chester Dowell, president of a corporation known as People's Finance & Thrift Corporation, hereinafter referred to as the "Finance Company", were made executors. The estate is the same which in a former appeal was before this court in another connection. Estate of Bruce, 19 Cal.App.2d 322, 65 P.2d 380. In April, 1937, the said Orpha E. Owen and Mary Elizabeth Pringey petitioned the court for distribution of the estate, reciting that the court had theretofore settled the final account of the executors; that during the progress of the administration the said Orpha E. Owen had assigned her interest in the estate to the Finance Company as security for the payment to said company of "a certain debt owed to said company by Dave R. Owen and Orpha E. Owen, his wife"; that petitioners were not informed as to the precise amount of this debt but that the Finance Company was entitled to have distributed to it enough money out of the share of said Orpha E.

5. Assignments ⚡48

An equitable assignment is a creature of equity, and the courts in the exercise of their equitable powers will not recognize and enforce any such assignment otherwise than as equity requires.

6. Evidence ⚡43(2)

On appeal from a decree of distribution, the District Court of Appeal would take judicial notice of circumstances disclosed in the record when the estate was before the District Court of Appeal in another connection.

7. Wills ⚡743

A residuary legatee who assigned her interest in estate to finance company to which she was indebted would not be deemed, under doctrine of equitable assignment, to have made an absolute conveyance instead of a conveyance merely to secure her indebtedness, where finance company had assigned interest in estate to legatee's brother whose claim to stock in residuary estate had been decided against him, and legatee's share of residuary stock was more than sufficient to

Owen to satisfy this indebtedness. Subject to that adjustment the petitioners prayed distribution of the residuary estate in equal shares to the said Orpha E. Owen, Mary Elizabeth Pringey and Dr. Bruce. To this petition Dr. Bruce filed an answer, the important allegations of which, for our present purposes, are the following:

"That Orpha E. Owen did heretofore for a good and valuable consideration sell and assign all of her right, title and interest in said estate to the People's Finance and Thrift Company of Porterville, California. That Lewis Bruce for a valuable consideration, acquired and now owns as his sole property all of the interest in and to the above entitled estate of Orpha E. Owen. That the said Orpha E. Owen is not entitled to receive from the said estate any of the assets thereof, or monies or any interest of said estate whatever."

The matter was heard by the court which filed findings of fact and conclusions of law and separately its decree of distribution based thereon.

The portions of the findings with which we are now concerned are those numbered II, III and IV as follows:

"II.

"The Court finds that Orpha E. Owen on the 12th day of April, 1932, made, executed and delivered an assignment of her interest in the Estate of H. S. Bruce, deceased, to the People's Finance & Thrift Company of Porterville, California, for the purpose of security for the debts which said Orpha E. Owen at that time owed to said company.

"III.

"The Court finds that on June 14, 1936, Orpha E. Owen owed the People's Finance & Thrift Company of Porterville, California, the sum of One Thousand Fifty-four (\$1,054.00) Dollars, secured by the assignment mentioned in Finding II above; that on said date Lewis Bruce paid said People's Finance & Thrift Company of Porterville, California, said sum of One Thousand Fifty-four (\$1,054.00) Dollars, and that said People's Finance & Thrift Company of Porterville, California, made, executed and delivered to said Lewis Bruce an assignment assigning to said Lewis Bruce all of its right, title and interest in and to the in-

terests of said Orpha E. Owen in said Estate of H. S. Bruce, deceased; that said Lewis Bruce is now the owner of the assignment mentioned in Finding II above, and holds said assignment as security for the payment to him of said sum of One Thousand Fifty-four (\$1,054.00) Dollars, together with interest on said sum at the rate of seven (7%) per cent per annum from the 14th day of June, 1935, to this date.

"IV.

"The Court finds that said Orpha E. Owen did not make any other assignment of her interest in the Estate of H. S. Bruce, deceased, to the People's Finance & Thrift Company of Porterville, California, other than the assignment for security mentioned in Finding II above."

The evidence is to the effect that prior to the death of H. S. Bruce, which occurred in 1930, Mrs. Owen and her husband were indebted to the Finance Company in the amount of \$2,100, for which the Finance Company held certain security. This indebtedness the Owens were unable to pay, in consequence of which, on April 12, 1932, Mrs. Owen executed a writing addressed to the executors in which she stated that she thereby assigned all of her interest in the estate to the Finance Company "to secure any and all obligations that I owe that corporation". At the bottom of this writing the executors noted their "acceptance" of the assignment, which would appear to have been thereupon delivered to the Finance Company. Delay ensued, however, in the settlement of the estate and the inability of the Owens to pay their obligation to the Finance Company resulted in the filing by the latter of an action for the purpose of augmenting its security wherein it attached a ranch belonging to the Owens. There had been extended negotiations between Dr. Bruce, on the one hand, and, on the other, first an attorney who is claimed to have represented the Owens, and later Mr. Owen, concerning some arrangement whereby Dr. Bruce should relieve the Owens of their debt to the Finance Company. Dr. Bruce claims that the substance of the plan was that he should see the debt satisfied and receive as compensation Mrs. Owen's interest in the estate. He claims that Mrs. Owen was fully cognizant of an understanding to that effect. Her claim is that she had, in person, little to do with the negotiations and made no arrangement to relinquish her in-

terest to her brother. Coincidentally with the negotiations between those who either represented or are claimed to have represented Mrs. Owen on the one hand and Dr. Bruce on the other, there was more or less protracted correspondence between the Owens and the Finance Company regarding the indebtedness. On one occasion, that is under date of January 30, 1935, Mrs. Owen wrote the Finance Company to the effect that: "We will pay the Finance Co. \$200 cash in addition to my share of my father's estate in full settlement of account. But I will not sign any further papers."

The evidence fails to show that this \$200 was ever paid and no claim seems to have been made that there was ever any written or definite acceptance of the proposition made in this letter. Mrs. Owen has testified that she never actually made any other assignment of her interest in the estate than the original one made, as stated, by way of security only.

The Owens at length succeeded in negotiating a sale of certain equipment that constituted part of the security for their indebtedness to the Finance Company whereby such indebtedness was, according to Dowell, reduced to \$1,054. Just when this reduction was accomplished does not in terms appear. It does appear, however, that on June 14, 1935, in consideration of a note for \$1,054, executed by Dr. Bruce to it the Finance Company executed to him what purported to be an assignment of "all its right, title and interest in and to the interest of Mrs. Orpha E. Owen in the H. S. Bruce estate". The Finance Company returned to the Owens their note which the latter seem to have retained and Mrs. Owen testified that she no longer considered herself indebted to the Finance Company. This is not, however, what she said in her petition for distribution and it is not clear to us what she meant by it.

The contention of the respondents is, as we understand it, that the original written assignment by Orpha E. Owen and her husband to the Finance Company is the only assignment of her interest in the estate ever actually made by her; that all other negotiations were tentative only and were never brought to any conclusion; that Dr. Bruce as assignee of the Finance Company merely stands in its shoes and is entitled to no more than that to which, but for the assignment to him, it would have been entitled, that is to the payment of the balance owed by the Owens; and that since the decree as enter-

ed provides for the reimbursement of Dr. Bruce as assignee of the Finance Company for all that he actually disbursed in purchasing the assignment from the Finance Company, which is in the same amount then owed by the Owens to the latter, full justice has been done.

[1-3] With this result we are in accord. Appellant urges that the residuary estate of the decedent is personal property and that the law recognizes the validity of verbal assignments of personal property. Granting this, it is still, in ordinary circumstances, a question of fact whether such an assignment has been made, and the trial court here has found on evidence, in its effect at least conflicting, that no assignment otherwise than as security was made. It is further suggested that the effect of the court's decree, if the assignment were treated as security only, would be to effect a foreclosure of the security without any proceedings appropriate to a foreclosure. We think, however, that its effect would be merely to provide for the payment of a debt. The evidence shows that the estate is in such condition that the obligation of \$1,054 found due out of Mrs. Owen's share to Dr. Bruce as assignee of the Finance Company, can be settled in cash, and that, therefore, no foreclosure is required. Dr. Bruce has submitted to the probate court the question of his right in and to the part of the estate claimed by Mrs. Owen, and in the circumstances we think that if the probate court was correct in finding that such right consisted, not in any ownership of Mrs. Owen's original interest in the estate, but only in the ownership of an indebtedness from Mrs. Owen which could be paid from money belonging to her in custodia legis, then that court was justified in providing for such payment rather than in requiring Dr. Bruce to commence an independent action to obtain it. At all events, it is impossible to see how Dr. Bruce could be prejudiced by the court's action and nobody other than Mrs. Owen could be heard to complain of it, and she in her petition for distribution has in effect consented to it.

[4-7] We still have to deal, however, with the appellant's claim that whether Mrs. Owen made such absolute assignment to the Finance Company or directly to Dr. Bruce of her whole share in the estate, or not, is no question of fact but one of law; and, therefore, that the trial court's determination of the question is not conclusive.

It is further claimed that such assignment necessarily results from the conduct of the parties. Since the trial court has found upon the facts against any express assignment, what appellant must rely on is an equitable assignment. Appellant relies on section 1589 of the Civil Code to the effect that:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The same rule is in effect otherwise stated in section 3521 of the Civil Code to the effect that:

"He who takes the benefit must bear the burden."

This rule, however, is in itself a rule of equity and as such must be given a reasonable interpretation. The benefits of the transaction which Mrs. Owen is claimed to have accepted are the cancellation of her indebtedness to the Finance Company and the dissolution of its attachment against her property.

An equitable assignment is a creature of equity. The courts therefore will hardly in the exercise of their equitable powers recognize and enforce any such assignment otherwise than as equity requires.

The record shows that at the time it is claimed that the equitable assignment occurred Dr. Bruce and Dowell, the latter being president of the Finance Company, in their capacities as executors of the H. S. Bruce estate, held in their hands assets of Mrs. Owen more than sufficient to discharge her indebtedness to the Finance Company which respondents claim that they delayed distributing in order to prevent her discharging her indebtedness and to enable Dr. Bruce to acquire her interest in the estate

for an inadequate consideration. We need not go so far as to decide that the record requires that interpretation of their conduct. We need only say that there is nothing in it to show that the estate might not have been closed on or before June 14, 1936, when Dr. Bruce took his assignment from the Finance Company, except for the circumstances disclosed in the record formerly before us in this estate, of which we will take judicial notice. In re Bruce's Estate, 19 Cal.App.2d 322, 65 P.2d 380, *supra*.

As appears from that record Dr. Bruce claimed adversely to the estate the ownership of 125 shares of stock in the Security-First National Bank of Los Angeles, which he had, nevertheless, inventoried in the estate, and which were appraised at \$14,000. This claim had been decided against him by the probate court in 1935 and was finally decided against him by this court on February 23, 1937, and rehearing denied on March 25, 1937. One hundred shares of this stock remain on hand, are of the appraised value of \$11,200, and one-third thereof, together with a small balance in cash, have been distributed, by the decree of distribution from which the present appeal is taken, to Mrs. Owen.

It would manifestly be a travesty on justice in these circumstances to give such an interpretation to the doctrine of equitable assignment, as, in addition to providing, as the present decree does provide, for the repayment to Dr. Bruce of the amount for which he obligated himself to the Finance Company in taking the assignment, to also transfer to him Mrs. Owen's share in this bank stock and the small sum of residuary cash distributed to her.

The decree of distribution is affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

26 Cal.App.2d 618

PEOPLE v. PRATT.

Civ. 1627.

District Court of Appeal, Third District,
California.

May 27, 1938.

Rehearing Denied June 11, 1938.

1. Indians ⇨38(2)

An Indian who lived on reservation, by acquiring a patent under federal statutes to land on reservation allotted to his father, was thereby emancipated from tribal relations and rendered amenable to civil and criminal laws, and hence superior court had jurisdiction to try Indian on charge of unlawful possession of metal knuckles. 25 U. S.C.A. §§ 331, 348, 349; Gen.Acts 1931, Act 1970, § 1.

2. Indians ⇨31

Under statute providing that, when allotted land has been conveyed to Indians by patent in fee, each allottee is subject to state laws, an Indian obtaining patent to allotment of reservation land thereafter acquires status of a United States citizen subject to civil and criminal laws of state, even though land is within quarters of an Indian reservation. 25 U.S.C.A. § 349.

3. Indians ⇨38(2)

Where state of California was admitted into Union on an equal footing with original states, sole jurisdiction was thereby conferred upon its courts to try Indian who was charged with illegal possession of metal knuckles on reservation and who had become emancipated from his tribal relations by acquiring patent in fee to allotted land. Act Sept. 9, 1850, 9 Stat. 452; Cr.Code § 328, 18 U.S.C.A. § 548; 25 U.S.C.A. § 349; Gen.Acts 1931, Act 1970, § 1.

4. Criminal law ⇨531(3)

Evidence that defendant's admissions, which were reduced to writing and signed by him, were made by defendant without offer of reward or threatened punishment, and that he was informed before he signed statement that he was not required to make statement and that any statement he made might be used against him, sufficiently established a foundation for reception of admissions.

5. Criminal law ⇨721(5)

In prosecution for illegal possession of metal knuckles, district attorney by inquiring, after reviewing uncontradicted evidence

that defendant was armed with concealed metal knuckles, whether there was any denial of that evidence, was not guilty of prejudicial misconduct, where defendant did not take stand in his own behalf. Pen.Code, § 1323, as amended by St.1935, p. 1942.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Lindley Pratt was convicted of having possession of metal knuckles, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, who is an Indian formerly residing on the Hoopa Reservation in Humboldt county, was convicted of the offense of having possession of metal knuckles contrary to the provisions of an act regulating the use and custody of deadly weapons. (Stats.1923, p. 695; 1 Deering's Gen.Laws of 1931, p. 900, Act 1970, sec. 1.) The offense was committed on the Hoopa Reservation. He was sentenced to state prison at Folsom for the indeterminate term prescribed by law. From that judgment and from the order denying a new trial this appeal was perfected.

[1] The defendant contends the state court was without jurisdiction to try or punish him on the criminal charge for the reason that he is an Indian who was living on the Hoopa Reservation in tribal relations; that the court erred in receiving evidence of his admissions without adequate proof of the foundation therefor, and that the district attorney was guilty of prejudicial misconduct in the course of his argument to the jury.

The superior court of Humboldt county under the circumstances of this case had jurisdiction to try the defendant for the crime of which he was charged. It appears without conflict that the defendant is an Indian who lived on the Hoopa Reservation in Humboldt county, where tribal relations were maintained. He was, however, the owner of five acres of land in that reservation which he inherited from

his father, who was also a member of that tribe and lived on the same reservation. The defendant's land is a portion of a government allotment which was granted to his father pursuant to a federal statute. After the defendant inherited the land, the government gave him a patent thereto on April 22, 1926, which was recorded in Book 24 of Patents, at page 186, Humboldt County Records. The acquiring of a patent to the title of that land, under the United States statutes, had the effect of emancipating him from tribal relations and conferred upon him all the rights, privileges and immunities of a citizen of the United States, rendering him amenable to the civil and criminal laws, and conferred jurisdiction on the state courts to try and punish him for violation of state laws.

The United States statutes provide for the surveying and allotment to individual Indians residing upon reservations of a limited number of acres of land susceptible of agricultural or grazing purposes. (25 U.S.C.A. 184, chapter 9, sec. 331.) The federal statutes also provide that the government may hold such allotted land in trust for the period of twenty-five years "for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance". (25 U.S.C.A. p. 220, chapter 9, sec. 348.) Section 349 of that same chapter then provides that: "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

In 25 U.S.C.A., sec. 217, p. 111, note 22, it is said with respect to the jurisdiction of state courts over crimes committed by an Indian on a reservation, who has received a patent to land allotted to him by the government: "Under Act of Feb. 8, 1887, c. 119, 24 Stat. 388 (set out, as amended by Act May 8, 1906, in Code at section 349 of this title), providing for the allotting of lands constituting an Indian reservation to the Indians in severalty

and the issuing of patents to the allottees therefor, and further providing that upon the completion of said allotments and the issuing of patents to each of the allottees constituting the tribe each allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state in which he may reside upon completion of the allotments and the issuing of patents to each of the allottees, jurisdiction is conferred on the state courts to try and punish an allottee for any violation of the laws of the state though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation. In *re* Now-ge-zhuck, 1904, 69 Kan. 410, 76 P. 877."

[2] It has been repeatedly held that, pursuant to the provision last quoted an Indian who has obtained a patent in fee to an allotment of reservation land is no longer deemed to be a ward of the government, and upon the contrary that he thereafter acquires the status of a citizen of the United States with all the rights, privileges and immunities thereof, subject to the civil and criminal laws of the state or territory where he resides, even though the land which he acquires is within the borders of an Indian reservation. *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067, 1070; *In re Now-ge-zhuck*, 69 Kan. 410, 76 P. 877; *Ex parte Nowabbi*, *Okl.Cr.App.* 61 P.2d 1139; *State v. Phelps*, 93 Mont. 277, 19 P.2d 319, 322; *State v. Lott*, 21 Idaho 646, 123 P. 491; *Eugene Sol Louie v. U. S.*, 9 Cir., 274 F. 47; *U. S. v. Kiya, D.C.*, 126 F. 879. In the *Big Sheep* Case, *supra*, it is said in that regard (page 1070): "It is clear that an Indian who has obtained patent in fee to his allotment not only is a citizen of the United States, but has all the rights, privileges, and immunities of citizens of the United States, and is subject to the civil and criminal laws of the state of Montana. He is no longer a ward of the government."

[3] There are certain Indian reservations in the United States over which the federal government has specifically retained jurisdiction to try and punish the Indian inhabitants thereof for violations of criminal laws. Where the enabling act of congress admitting a state into the Union makes no such reservation of jurisdiction with respect to Indian tribes therein, and upon the contrary when states are admitted "on an equality with the orig-

inal states," the sole jurisdiction to try and punish Indians therein who have been emancipated in the manner heretofore stated is conferred upon the state courts, with certain exceptions which are not here involved. *Draper v. U. S.*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed 419; *U. S. v. McBratney*, 104 U.S. 621, 26 L.Ed 869; 31 C. J. 539, sec. 128. In the *McBratney* Case, supra, the court says (page 623): "Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. * * * The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception * * * has acquired criminal jurisdiction. * * * The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation."

The preceding language applies with equal force to the emancipated Indians on the Hoopa Reservation in this state. California was admitted into the Union "on an equal footing with the original States in all respects whatever". Act Sept. 9, 1850, 9 U.S.Stats. at Large, p. 452.

There are certain exceptions to the rule above stated which confers upon state courts the jurisdiction to try and punish Indians for crimes committed by them on an Indian reservation when the accused has been emancipated by receiving a federal patent to government land. Such exceptions apply to murder and other designated crimes by virtue of the specific reservation of jurisdiction in the United States court to try and punish Indians for such specified crimes wherever they may be committed. U.S.Crim.Code, sec. 328, 35 Stats. at Large, p. 1151, 18 U.S.C.A. § 548; *Apapas v. United States*, 233 U.S. 587, 34 S.Ct. 704, 58 L.Ed 1104. The offense of having possession of metal knuckles is not included within that statute, and the state courts, therefore, have exclusive jurisdiction of the last-mentioned offense.

It follows that the superior court of Humboldt county had exclusive jurisdiction to try and sentence the defendant for the crime with which he was charged, in spite of the fact that he lived on the Hoopa Reservation where Indian tribal re-

lations are maintained, for the reason that he was previously emancipated from his tribal relations and became a citizen subject to the civil and criminal laws of California, by acquiring a patent in fee to his land under the federal statutes above cited.

[4] The defendant's admissions which were received by two officers, reduced to writing and signed by him, to the effect that he had in his possession the metal knuckles with the custody of which he was charged, were properly admitted in evidence at the trial. The foundation for the reception of that evidence was fully established. Two witnesses testified positively that the statement was voluntarily made by the defendant without an offer of reward or threatened punishment, and that he was informed before he signed the statement, which was previously read to him, that he was not required to make any statement unless he desired to do so, and on the contrary that if he did make a statement it might be used against him at the trial of a criminal case. The record contains no evidence to the contrary. The defendant did not take the witness stand in his own behalf.

[5] We are of the opinion the district attorney was not guilty of prejudicial misconduct in his argument to the jury. After reviewing the uncontradicted evidence to the effect that the defendant was armed with metal knuckles concealed beneath a handkerchief covering his hand, with which he threatened to assault the prosecuting witness, James Marshall, the district attorney inquired, "Is there any denial of that?" In the defendant's written statement, he admitted his possession of the metal knuckles. There was no evidence to the contrary. Since the amendment to section 1323, of the Penal Code in 1935, St.1935, p. 1942, the district attorney is specifically authorized to comment to the jury upon the defendant's failure to deny or explain the evidence which is adduced against him at the trial.

The other statements of the district attorney, of which the defendant complains, constituted legitimate response to the argument of adverse counsel. There is no merit in those assignments of misconduct.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

LEWIS v. JOHNSON et al.*

Civ. 11729.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1938.

Rehearing Denied June 24, 1938.

Hearing Granted by Supreme Court
July 25, 1938.

1. Dismissal and nonsuit $\S$ 29

Where plaintiff in malpractice suit executed covenant not to sue two defendants, in consideration of \$6,000, and plaintiff's attorney gave to defendants' attorney a dismissal of pending suit, and appeared in open court and dismissed the suit as against such defendants, there was a "retraxit," operating as a discharge of other defendants. Civ. Code, $\S$ 3528.

[Ed. Note.—For other definitions of "Retraxit," see Words & Phrases.]

2. Dismissal and nonsuit $\S$ 29

A "retraxit," meaning "he hath withdrawn," ensues when plaintiff, if appearing in propria persona, or his attorney, voluntarily renounces his suit or cause of action in open court after action is commenced.

3. Dismissal and nonsuit $\S$ 29

With respect to status of a dismissal under covenant not to sue as constituting a retraxit, parties may not by their words change the legal consequences flowing from their acts. Civ. Code, $\S$ 3528.

4. Dismissal and nonsuit $\S$ 29

A retraxit as to one joint tort-feasor releases all joint tort-feasors, irrespective of attempted reservation of a cause of action against some of the tort-feasors and regardless of the intention of the parties.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by William E. Lewis against Carl G. Johnson and another, for damages for malpractice. From a judgment on a directed verdict for defendants, plaintiff appeals.

Affirmed.

Taylor, Kolliner, Bolton & Schwartz and Combs, Fritz & Murphine, all of Los Angeles, for appellant.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for respondent Carl G. Johnson.

W. I. Gilbert, Fred O. Reed, and W. I. Gilbert, Jr., all of Los Angeles, for respondent Carl H. Gans.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of defendants' motion for a directed verdict in an action to recover damages for malpractice, plaintiff appeals.

The essential facts are:

August 9, 1936, plaintiff in an automobile accident received a fracture of both bones of his left leg. He was removed to the Seaside Hospital in Long Beach, California, and the fractures reduced by defendant doctors.

The injured leg did not make a satisfactory recovery and it subsequently became infected, necessitating the amputation of his left leg slightly below the knee. Thereafter plaintiff instituted the present action, alleging malpractice and naming as defendants Dr. Carl G. Johnson and Dr. Carl H. Gans (the doctors who reduced the fracture in his leg), the Seaside Hospital of Long Beach (the hospital in which the fracture was reduced), and Miriam Furlong (superintendent of nurses of the Seaside Hospital of Long Beach).

Briefly, plaintiff alleged his cause of action to be that the defendant doctors were guilty of malpractice in having placed a cast too tightly on his leg, and that the defendant hospital and defendant superintendent of nurses were negligent in not having advised the defendant doctors promptly after discovering that the cast upon plaintiff's leg was too tight.

On August 13, 1937, the trial of the action against all defendants commenced before a jury. August 21, 1937, Mr. Fritz, an attorney for plaintiff, telephoned Mr. Quail, claim superintendent for the United States Fidelity and Guarantee Company. During the conversation Mr. Quail inquired how much money plaintiff wanted for a covenant not to sue the defendant hospital and defendant superintendent of nurses. The amount named by Mr. Fritz he deemed too high, and no agreement was reached at that time. The following day the same parties had a telephone conversation in which Mr. Fritz said the plaintiff would accept \$7,500 for a covenant not to sue, but Mr. Quail informed him the sum was too high and he would not consider paying more than \$6,000. Later in the day Mr. Fritz made an appointment to see Mr. Quail and after some negotiations it was agreed that \$6,000 should be paid to plaintiff for a covenant not to sue defendant hospital and defendant superintendent of nurses. Their

*For subsequent opinion see 86 P.2d 99.

conversation terminated, according to Mr. Quail, as follows:

"And he (Mr. Fritz) said something about the form of the covenant and I told him that the mechanics of the thing would have to be worked out between he and Mr. Hunter the next morning. He said that was fine. He then said, 'You understand, of course, Mr. Quail, that this is not a settlement.' I said, 'That is the way I understand it.'"

The following morning, August 23, 1937, in the office of Mr. Hunter (attorney for the defendant hospital and defendant superintendent of nurses) he, Mr. Fritz, and Mr. Quail held a conference at which was presented a document executed by plaintiff entitled "Covenant Not to Sue and Covenant Not to Sue Further". Mr. Hunter desired certain changes to be made in this document, which Mr. Fritz agreed to, stating that plaintiff was in a taxicab waiting for him and that he would telephone his office and have the notary public who had taken the plaintiff's acknowledgment meet them in front of the Hayward Hotel. This was done and the following document duly executed by plaintiff and his wife was then handed to Mr. Hunter:

"Covenant Not to Sue and Covenant Not to Sue Further.

"I, Dr. William E. Lewis, of the County of Los Angeles, State of California, having been on or about the 9th day of August, 1936, involved in an automobile accident on the Coast Highway, near the City of Huntington Beach, California, during the early morning hours of said day, and thereafter having been removed to the Seaside Hospital at Long Beach, California; and

"Whereas, the undersigned was there treated and cared for by the said Seaside Hospital and Dr. Carl G. Johnson and Dr. Carl H. Gans for a period of four to six weeks; and

"Whereas, the undersigned Dr. William E. Lewis, claims as a result of said treatment and care so administered to the undersigned at and by the said Seaside Hospital and the said Dr. Carl G. Johnson and Dr. Carl H. Gans the undersigned did sustain certain injuries and damages; and

"Whereas, the superintendent in charge of nurses at said hospital at said time was Miriam Fay Furlong; and

"Whereas, said Seaside Hospital of Long Beach, Ltd., a corporation, (hereinbefore

referred to as Seaside Hospital) and said Miriam Fay Furlong, desire from the undersigned an agreement and covenant not to sue and a covenant not to sue them or either of them further, and/or prosecute any suit or suits now pending against them by the undersigned in connection with said treatment, care injuries and/or damages;

"Now therefore, in consideration of the sum of Six Thousand (\$6,000.00) Dollars, the undersigned hereby promises and agrees that he will not sue and/or sue further the said Seaside Hospital of Long Beach, Ltd., a corporation, and/or the said superintendent in charge of nurses at said hospital, namely, Miriam Fay Furlong, or either of them, nor prosecute any action or actions now pending against them, nor either of them, for or on account of any injuries or damages which the undersigned now has or may hereafter have or have on account of said injuries sustained in the accident above mentioned, and the undersigned hereby does covenant and agree to hold said Seaside Hospital and said Miriam Fay Furlong, and each of them, harmless from any liability, claims, demands, costs, charges and expenses incident to any claim or claims arising out of said accident, treatment, care, or the injuries or damages sustained by the undersigned in connection with the said accident, treatment and care.

"It is further agreed and understood that the undersigned does not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firm, firms, corporation or corporations other than herein specifically named, and it is further understood by the undersigned that said Seaside Hospital of Long Beach, Ltd., a corporation, and said Miriam Fay Furlong, and either of them, do in any manner or to any extent admit any liability or responsibility for the above accident, treatment, and/or care, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph, as herein specified.

"In witness whereof, I have hereunto set my hand this 23 day of August, 1937. Dr. William E. Lewis."

Thereupon Mr. Quail asked Mr. Hunter if the document was satisfactory and was informed it was. Mr. Hunter then directed him to give Mr. Fritz a draft for \$6,000. After Mr. Fritz received this draft Mr. Hunter inquired of him, "How are we going to take care of this matter? Is it go-

ing to be necessary for me to come up into court?" to which Mr. Fritz replied, "No, I have no intention of proceeding further against the Seaside Hospital or the nurse. I will give you a dismissal as to those defendants."

Mr. Fritz then handed to Mr. Hunter a dismissal reading as follows:

"In the Superior Court of the State of California in and for the County of Los Angeles

"William E. Lewis, Plaintiff, vs. Carl G. Johnson, et al., Defendants.	}	No. 410,617 Dismissal
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"To the Clerk of Said Court: You will enter the dismissal of the above entitled action against Seaside Hospital of Long Beach, Ltd., a corp., and Miriam Fay Furlong only. Los Angeles, Calif. Aug. 23, 1937. Combs, Fritz & Murphine By: Paul J. Fritz, Attorneys for Plaintiff."

Plaintiff, his attorney, Mr. Hunter, and Mr. Quail then proceeded to the courtroom where the trial was pending and, upon defendant doctors' attorneys asking permission to file an amended pleading alleging that plaintiff had settled his case with one of the joint tort-feasors and had thereby released all of the defendants, the following ensued:

"The Court: Do you want to be heard, Mr. Fritz?"

"Mr. Fritz: Yes, if the Court please, there is nothing before the Court to show there has been any settlement or release. The facts are there is no settlement, there is no release. We will state to the Court there has been executed for a consideration a covenant not to sue and covenant not to sue further or prosecute any action which has been commenced as far as it affects the Seaside Hospital or May Furlong. It is not by way of settlement. * * *

"The Court: You refer to a dismissal?"

"Mr. Fritz: I state now I dismissed the action so far as the Seaside Hospital is concerned and so far as the defendant May Furlong is concerned. * * *

"Mr. Hunter: In so far as the Hospital is concerned, if your Honor please, if there is any reason that either Mr. Gilbert or Mr. Fritz would like me to remain I would be glad to remain, if there is any reason, to

explain anything surrounding the giving of this instrument. On the other hand, if there is not, I will be available in the office and I would like to be excused. It is my understanding that in so far as the Seaside Hospital and Miss Furlong are concerned you will dismiss as to them.

"Mr. Fritz: I have dismissed.

"The Court: There is no dismissal in the files. I presume it was filed in the Clerk's office and it has not come through yet.

"Mr. Fritz: Mr. Hunter has the dismissal in his office. * * *

"Mr. Hunter: As soon as the Clerk comes in we will file the dismissal.

"The Court: Let me see the dismissal. The Court now orders the dismissal filed.

"Mr. Hunter: Is there any reason for my remaining?"

"The Court: Not as far as the Court is concerned.

"Mr. Gilbert: There isn't as far as we are concerned except with the agreement that you keep yourself available so if we do need you we can call you."

The trial of the action thereafter continued as against the doctor defendants only until August 27, 1937, upon which date the trial judge granted defendant doctors' motion for a directed verdict and a judgment in their favor was accordingly entered.

This is the sole question necessary for us to determine:

Do the foregoing facts constitute a retraxit?

[1, 2] This question must be answered in the affirmative. A *retraxit* (he hath withdrawn) ensues when plaintiff, if appearing in propria persona, or his attorney, if he is represented by counsel (*Merritt v. Campbell*, 47 Cal. 542, 545; *Westbay v. Gray*, 116 Cal. 660, 666, 48 P. 800; *Chase v. Van Camp Sea Food Co., Inc.*, 109 Cal. App. 38, 46, 292 P. 179; *Bogardus v. O'Dea*, 105 Cal.App. 189, 193, 287 P. 149), after an action is commenced (*Lowry v. McMillan*, 8 Pa. 157, 163, 49 Am.Dec. 501), in open court voluntarily renounces his suit or cause of action. III Blackstone's Commentaries, sec. 374d, vol. 2 Jones Ed. (1916) 1885; *Merritt v. Campbell*, 47 Cal. 542, 545; *Chase v. Van Camp Sea Food Co., Inc.*, 109 Cal.App., 38, 46, 292 P. 179; *Sheffer v. B. B. Perkins & Co.*, 83 Vt. 185, 75 A. 6, 7, 25 L.R.A., N.S., 1313.

It is clear that each of the elements necessary for a *retraxit* are present in the instant case. Plaintiff's attorney, Mr. Fritz, in open court after the action had been commenced voluntarily dismissed the cause of action against the defendants Seaside Hospital of Long Beach and Miriam Furlong. The document denominated "Covenant Not to Sue and Covenant Not to Sue Further" is mere surplusage, in view of the uncontradicted evidence which discloses that all of the elements necessary for a *retraxit* were present.

[3] It is a maxim of law that "the law respects form less than substance." Sec. 3528, Civ.Code; *Waters v. Pool*, 149 Cal. 795, 804, 87 P. 617. Hence, it is evident that it was in fact the intention of the plaintiff to release the defendants Seaside Hospital of Long Beach and Miriam Furlong from any and all liability on the cause of action alleged in the complaint as amended. Though justice may be symbolized as having a hoodwink over her eyes, thus denoting that she deals impartially with those who appear before her, justice is not blind and the parties may not by their words change the legal consequences flowing from their acts. This court will not say that black is white because the parties so designate the colors when the facts show to the contrary.

[4] The attempted reservation of a cause of action against the remaining defendants was ineffectual and void. It is settled that a *retraxit* as to one joint tort-feasor releases all of the joint tort-feasors (*Bogardus v. O'Dea*, 105 Cal.App. 189, 192, 287 P. 149; 22 Cal.Jur.[1925] 763, sec. 12; Vol. 2 Bancroft's Code Pleading Practice and Remedies, Ten Year Supp. [1937] 1604, sec. 537), irrespective of the attempted reservation of a cause of action against some of the tort-feasors and regardless of the intention of the parties. *Flynn v. Manson*, 19 Cal.App. 400, 403, 126 P. 181.

In *Bogardus v. O'Dea*, supra, at page 192, 287 P. at page 150 this court said:

"According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort—giving rise to this cause of action, and hence a *retraxit* of the cause of action in favor of any of them operated as a release of all of them. As said in *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45

P. 704, 707: 'While plaintiff may sue one or all of joint tort feasers, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasers, his right to proceed further against the others is at an end. Where several joint tort feasers have been sued in a single action, a *retraxit* of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. *By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of*, and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all.' (Italics ours.) In *Flynn v. Manson*, 19 Cal.App. 400, 126 P. 181, the action was against several defendants for the recovery of damages for tort. The plaintiff, dismissed as to one of the defendants, the dismissal however, containing a provision that it was not the intention of the plaintiff to release the other defendants from liability. The remaining defendants moved for dismissal of the action as to them, upon the same ground as that urged in the instant case. Affirming the judgment of dismissal which followed the order granting this motion, the court held that the release, notwithstanding the saving clause, was a discharge, not only as to the defendant as to whom the dismissal was filed, but as to his codefendants. To the same effect are the decisions in *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163, 4 P. 1165, and *Urton v. Price*, 57 Cal. 270, 272."

It therefore appears that plaintiff, having released two of the joint tort-feasors, as a matter of law released the other defendants from further liability with the result that the trial court properly directed the jury to return a verdict in favor of defendant doctors.

The conclusion which we have reached renders it unnecessary for us to discuss the various other points presented by counsel.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

26 Cal.App.2d 616

PEOPLE v. MORRISON et al.

Cr. 3091.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1938.

1. Criminal law ☞1202(3)

The prosecution must charge and prove the fact of a prior conviction for a felony on which prosecution relies for imposition of a sentence which can be justified only if the facts of alleged prior conviction are true.

2. Criminal law ☞1202(3)

An exemplified copy of the record of a Michigan conviction referring to a statute which revealed that conviction was for a misdemeanor in that state, without proof that offense would constitute a felony if committed in California, was insufficient to warrant sentencing defendant on a charge of feloniously taking a motor vehicle, on the basis of a prior conviction of a felony. St.1935, p. 174, § 503; Pen.Code, § 487.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Proceeding by the People against Howard Morrison and others, wherein Harley J. Robinson was convicted of feloniously taking a motor vehicle and sentenced to the state prison on basis of a prior conviction, and he appeals.

Reversed, with directions.

Frederic H. Vercoe, Public Defender, and John J. Hill, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

WOOD, Justice.

Appellant was charged in each of two counts of the information with the felonious taking of a motor vehicle in violation of section 503 of the California Vehicle Code, St.1935, p. 174. The information further charged: "That before the commission of the offenses in this information hereinbefore set forth, the said defendant, Harley J. Robinson (under the name of Harley Robinson), was in the circuit court of the state of Michigan, in and for the county of Hillsdale, convicted of

the crime of larceny, a felony, and the judgment of said court against said defendant, in said connection, was, on or about the 16th day of January, 1934, pronounced and rendered, and said defendant served a term of imprisonment therefor in a penal institution. The former conviction herein alleged against said defendant Harley J. Robinson is hereby charged against him with respect to each of the counts hereinbefore set forth, and by reference the same is hereby made a part of said counts." Appellant entered pleas of guilty to each of the said counts but denied that he had previously been convicted of a felony. The trial court found that the charge of the prior conviction of a felony was true and sentenced appellant to the state prison at Folsom.

[1,2] The appellant contends that the trial court erred in holding that he had been convicted of a felony in the state of Michigan. The attorney-general has filed a brief in which he frankly and properly concurs in the contention of appellant. The only evidence offered by the prosecution to establish the prior conviction was an exemplified copy of the record of the Michigan conviction, introduced as people's exhibit one. In this exhibit it is recited: "The People of the State of Michigan v. Harley Robison, Respondent. Harley Robison, the respondent in this cause, having pleaded guilty to the court, to larceny, was brought before the court for sentence, and the sentence of the court is, that he be confined in the Michigan State Reformatory for a maximum period of two years and a minimum of one year. The court refers to Section 361 of Chapter 52 of Act 325 [No. 328] of the Public Acts of 1931 of this state as the provision of law under which sentence is imposed." An examination of the Michigan statute to which reference was made discloses that the charge to which appellant pleaded guilty in Michigan was denominated a misdemeanor and not a felony. It is necessary for the prosecution not only to charge the facts of the previous conviction but also to prove them. *People v. King*, 64 Cal. 338, 30 P. 1028. The record contains no proof that the offense committed in Michigan would constitute a felony if it had been committed in California. There is no proof that the value of the property taken in Michigan was in excess of \$200 nor is there any proof of any facts which would bring the Michi-

gan offense within the definition of grand theft as set forth in section 487 of the Penal Code of California.

The judgments are reversed and the superior court is directed to pronounce new judgments not inconsistent with the views herein expressed.

We concur: CRAIL, P. J.; McCOMB, J.



26 Cal.App.2d 613

BROUN v. BLAIR.

Civ. 11690.

District Court of Appeal, Second District,
Division 2, California.

May 27, 1938.

1. New trial ⚡39

In action for death of a pedestrian struck at an intersection by a motorist, refusal to instruct that motorist and pedestrian were both chargeable with reasonable care, but a greater amount of care was required of motorist because he was driving an automobile which was capable of injuring others on highway, was error, authorizing a new trial.

2. Automobiles ⚡246(60)

In action for death of a pedestrian struck at an intersection by a motorist, refusal to instruct that pedestrian was presumed to have used ordinary care for his safety in crossing highway, which presumption was a species of evidence to be considered until overcome by satisfactory evidence, was error, where testimony of plaintiff's eyewitness could not be held inconsistent with presumption.

3. Automobiles ⚡226(2)

The negligence of pedestrian struck by motorist while crossing intersection must have been a proximate cause of the injury to bar a recovery.

4. Trial ⚡253(4), 296(4)

In action for death of a pedestrian struck at an intersection by a motorist, an instruction that recovery was barred if pedestrian failed to exercise ordinary care under the circumstances, regardless of who

had the right of way under the Vehicle Code, was erroneous, in that it omitted the element of proximate cause and was not cured by other instructions. St.1935, p. 93.

5. Automobiles ⚡245(72)

In action for death of a pedestrian struck at an intersection by a motorist, evidence regarding pedestrian's contributory negligence justified submission of such issue to jury.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Lucy E. Broun against W. D. Blair for the death of her son who was struck by defendant's automobile. A new trial was granted after a verdict and judgment for defendant, and he appeals.

Affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Catlin & Catlin, of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from an order in general terms granting plaintiff's motion for a new trial after judgment was entered in favor of defendant upon the return of a jury's verdict.

Plaintiff seeks to recover damages resulting from the death of her son, Percy H. Broun, who was killed when he was struck by an automobile driven by defendant. The accident occurred at the intersection of Main and Second streets in the city of Alhambra at about 7:30 p. m., on January 29, 1937. The decedent was walking in a pedestrian zone at the intersection in question and was struck about twenty-four feet from the curb. The street was well lighted. Defendant testified that he did not see the decedent until he was under the car. Other witnesses testified that decedent looked in both directions, to his right and to his left, before he was struck. Defendant presented three defenses, that he himself was not negligent, that the decedent was contributorily negligent and that the accident was unavoidable.

[1] The court erred in refusing to give to the jury the following instruction requested by plaintiff: "I instruct you that defendant Blair, the driver of the automobile, and Percy Hamilton Broun, the pedestrian, were both chargeable with only the

exercise of reasonable care, but a greater amount of such care was required of the defendant Blair at the time of the accident in question by reason of the fact that he was driving and operating an automobile which was capable of inflicting death or injury upon others upon the highway." In *Vedder v. Bireley*, 92 Cal.App. 52, 267 P. 724, the same instruction was requested and the refusal of the trial court to give it was held to be erroneous. A similar ruling was made in *Pinello v. Taylor*, 128 Cal. App. 508, 17 P.2d 1039; *Dawson v. Lanne*, Cal.App., 70 P.2d 1002.

[2] The trial court refused to give an instruction requested by plaintiff as follows: "I instruct you that there is a presumption that Percy Hamilton Broun used ordinary care for his safety as he was crossing the highway on the night he was injured. This presumption is in itself a species of evidence and it shall be so considered in your deliberations until and unless it is overcome by satisfactory evidence." This instruction should have been given. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Geisler v. Rugh*, 19 Cal.App.2d 738, 66 P. 2d 671; *Lam Ong v. Pacific Motor Corporation*, 16 Cal.App.2d 274, 60 P.2d 480. In *Stealey v. Chessum*, 123 Cal.App. 446, 11 P.2d 428, it was held that the court erred in refusing to give an instruction couched in the same language as the one under discussion. Although the plaintiff in the present case offered the testimony of an eye witness it cannot be held that the testimony was inconsistent with the presumption mentioned in the proffered instruction.

[3,4] The court erroneously gave to the jury this instruction: "You are instructed that even though you may find from the evidence the deceased was entitled to the right of way under the Vehicle Code, [St.1935, p. 93], still that fact, if you should find it to be a fact, would not relieve the deceased from the duty to exercise ordinary care and caution or that degree of care and caution which an ordinary and prudent person would exercise under the same and similar circumstances in keeping a reasonable lookout for approaching automobiles and if you find from the evidence in this case that the deceased failed to exercise ordinary care in keeping a lookout for approaching vehicles, then I charge you the deceased was guilty of negligence, regardless of who you may find under the evidence had the right of way, and such negligence, if any, would bar a recovery by the plaintiff

as heir in this case." The instruction is defective in that it omitted the element of proximate cause. In order to bar a recovery the negligence of the deceased must have been a proximate cause of the injury. The error was not cured by the giving of other instructions. *La Rue v. Powell*, 5 Cal.App.2d 439, 42 P.2d 1063.

[5] Defendant contends that the deceased was guilty of contributory negligence as a matter of law. Sufficient evidence was received to justify the submission of this issue to the jury.

Since errors were committed by the trial court in the course of the trial the order granting a new trial must be upheld. The order is affirmed.

We concur: CRAWL, P. J.; McCOMB, J.



ENGELKING v. CARLSON et al. *
Civ. 10627.

District Court of Appeal, First District,
Division 2, California.

June 1, 1938.

Hearing Granted by Supreme Court
July 28, 1938.

1. Trial $\hookrightarrow$ 142

A nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled and indulging in every legitimate inference which may be drawn from plaintiff's evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Physicians and surgeons $\hookrightarrow$ 18(9)

Under *res ipsa loquitur* doctrine, in action by patient, who suffered "foot drop" from severance of external peroneal nerve during operation on knee, against two surgeons, one of whom used no instruments which would sever nerve, directed verdict for the other surgeon was not authorized by evidence that nerve was not to be treated, although it was within the operative field and had to be retracted to one side, that surgeons followed standard practice, and that nerve would be severed in from 5 per cent. to 9 per cent. of the cases, notwithstanding exercise of due care.

*For subsequent opinion see 88 P.2d 695.

3. Physicians and surgeons ⇨18(6)

As respects malpractice cases involving operations, where act causing injury is one which can be visualized by layman, *res ipsa loquitur* doctrine is applicable, but where it is one depending entirely on scientific or medical knowledge, the doctrine is inapplicable.

4. Negligence ⇨121(2)

The doctrine of *res ipsa loquitur* gives rise to an inference rather than a presumption.

5. Negligence ⇨121(2)

The inference arising under the *res ipsa loquitur* doctrine is dispelled as a matter of law when rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, though such evidence is produced by the party not relying on the inference.

6. Physicians and surgeons ⇨18(9)

In action against two surgeons by patient who allegedly suffered "foot drop" from severance of, and not from injury to, external peroneal nerve during operation on knee, evidence that one surgeon did not cut around nerve or use instruments which would sever nerve, although he did use instruments which might injure it, authorized nonsuit as to such surgeon.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Malpractice action by Charley H. Engelking against F. J. Carlson and another, surgeons. From an adverse order and adverse judgments, plaintiff appeals.

Affirmed in part, and reversed in part.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff has appealed from an order granting the nonsuit and the judgment of dismissal entered in favor of defendant Ream, and from the judgment entered in favor of defendant Carlson, subsequent to the granting of his motion for a directed verdict. Defendants are duly licensed and practicing physicians and surgeons. Plaintiff sought to recover damages for physical injuries alleged to have been sustained as a

result of the asserted negligence of defendants in the performance of a surgical operation on the left knee of plaintiff.

[1] "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" In *re Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768.

In the light of this rule, the facts of the present case are as follows: Plaintiff Engelking, while engaged in the repair of an elevator, injured his left knee and was treated by defendant Carlson, a duly licensed physician and surgeon, whose services were supplied by the insurance carrier of plaintiff's employer. Plaintiff suffered a strain of the crucial ligaments and external lateral ligaments of the left knee, and he was treated accordingly. As the result of said treatment, plaintiff was able to walk and had full use of his left leg and foot, but some instability remained in his left knee which made it impossible for him to perform the work he had formerly been employed to do, and therefore defendant Carlson suggested an operation on the left knee to repair the injured ligaments.

On March 9, 1936, defendant Carlson, assisted by defendant Ream, performed the operation which forms the basis of plaintiff's action. Immediately after the operation, it was apparent that he was suffering from what is known as foot drop, and his leg was placed in a cast as a treatment. Foot drop consists of a loss of ability to turn the foot inward, a loss of ability to extend the toes and to raise them, and a loss of sensation in the lower frontal portions of the leg below the knee, and the greater portion of the top of the foot. The treatment given resulted in no improvement. On August 1, 1936, Dr. Lawrence performed an operation on plaintiff's left knee in approximately the same location as the incision made by defendant Carlson during the prior operation. He found that the external peroneal nerve had been severed at a point approximately where its course inter-

sected the course of the incision made by defendant Carlson. Dr. Lawrence freshened the ends of the nerve and sutured them together. There had been practically no improvement in plaintiff's condition at the time of the trial.

The external peroneal nerve is a nerve approximately $3\frac{1}{2}$ to 5 millimeters in diameter. It has both motor and sensory functions, controlling the peroneus muscles and the extensor muscles of the toes and furnishing sensation in the front and lower part of the leg and the top of the foot. It controls the raising of the foot, the turning of the foot inward, and the extension of the toes. Its course runs down the space behind the knee, downward and around through the muscle and around the neck of the fibula. During the course of the operation performed by defendant Carlson, it was necessary to retract the nerve and pull it to one side in order that the ligaments could be repaired. The nerve was not isolated but was retracted with the muscles in which it was imbedded.

Defendants concede that the condition of the left leg and foot of plaintiff subsequent to the first operation was due to the severance of the peroneal nerve, and that the evidence is sufficient to establish the fact that the nerve became severed during the course of the operation.

Plaintiff contends that there is evidence that the operation although not an emergency operation, was performed hurriedly and therefore negligently. The plaintiff testified to a conversation had with defendant Carlson as follows: "I said I had read an article in a magazine by some doctors down in Los Angeles that after they had sutured a cut and it healed up there wouldn't be any scar. And he said, 'Well, I could do that, too, but I was in a hurry, and I didn't suppose you were going into any beauty contest.' Q. And that was said with reference to this scar on the side of your leg, designating the left leg. A. That is correct." The language of *Phillips v. Powell*, 210 Cal. 39, at page 43, 290 P. 441, at page 443, is applicable here. The court said, "We are of the opinion that these statements or otherwise did not constitute admissions that the defendants 'did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by the members of their profession in good standing practicing in their vicinity,' which is the only standard by which the liability of the defendants may be

determined." The statement of defendant Carlson is not an admission of any lack of care in the performance of the operation. It cannot be distorted to mean any more than that he hurried in suturing the outer incision, and therefore the scar left was larger than it might have been.

Plaintiff's contention that the evidence shows that defendants failed to examine the nerve before closing the wound to ascertain if the nerve had been injured, and that this omission constituted negligence, is without merit. The medical testimony discloses that the nerve was not laid bare, but was retracted with the tissue surrounding it. To examine it, the surrounding tissue would have to be laid open along the length of the nerve, an act which might itself result in severe injury to the nerve. It further discloses that the standard practice of surgeons of good repute in the locality is to ascertain whether the nerve has been injured after the completion of the operation and after the patient has regained consciousness by means of testing certain reflexes in the lower leg and foot. This was done, and it was through this diagnosis that the foot drop was discovered.

[2] It is next argued that the facts of the case make it proper for the application of the doctrine of *res ipsa loquitur*, and therefore an inference of negligence might arise sufficient to support a verdict in plaintiff's favor. With this we must agree.

The facts of this case bring it within the doctrine announced in *Brown v. Shortlidge*, 98 Cal.App. 352, 277 P. 134, and *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409, where the opinion of *Brown v. Shortlidge* is extensively quoted and adopted. In *Armstrong v. Wallace*, 8 Cal.App.2d 429, 47 P.2d 740, and in *Thomsen v. Burgeson*, Cal.App., 79 P.2d 136, the same doctrine is followed. In these cases, the doctrine of *res ipsa loquitur* has been applied where injury has resulted from the work of a surgeon during the course of an operation. In *Brown v. Shortlidge*, supra, the plaintiff's jaw was fractured and a tooth knocked out during the course of an operation to remove adenoids. In both *Ales v. Ryan*, supra, and *Armstrong v. Wallace*, supra, the injury resulted from a laparotomy sponge left in the body cavity during the course of an operation involving the opening of the body cavity. In *Thomsen v. Burgeson*, supra, plaintiff's uvula and a portion of the soft palate were

removed and a portion of the throat injured in the course of a tonsilectomy performed by defendant.

[3] The determining factor in the question of the applicability of the doctrine in operative cases of this kind is whether the act causing the injury is one which can be visualized by the layman or whether it is one which depends entirely upon scientific or medical knowledge. The application of the doctrine, under the rule of the cases cited, seems evident. The plaintiff was completely anaesthetized, and, while in that condition, the operation was performed upon his knee. It is impossible for plaintiff to know what occurred. Defendants were in complete charge of the operation, during the course of which the external peroneal nerve was severed. We are not here involved with negligence in either the diagnosis of a condition or in its treatment. The facts of this case show that the nerve was not being treated, and that it was not in any way diseased. True, the nerve lay in the operative field, but it was involved only to the extent that it had to be retracted to one side in order that the operator might go beneath it.

Defendants rely strongly upon *Nicholas v. Jacobson*, 113 Cal.App. 382, 298 P. 505. In that case it was held that the doctrine of *res ipsa loquitur* was not applicable. There the plaintiff sought to recover for the loss of a testicle, resulting, he claimed, from the negligence of defendant during an operation to remove varicose veins from the scrotum of the plaintiff. The expert evidence showed that the testicle atrophied, and that at the time defendant operated the atrophy had progressed to such a point that complete destruction was probable. However, in the course of the opinion this court said, page 385, 298 P. page 506:

"This brings us to the oft-disputed question of the application of the *res ipsa loquitur* doctrine in cases of alleged professional malpractice. In *Brown v. Shortlidge*, 98 Cal.App. 352, 357, 277 P. 134, 136, the court reviews a number of cases dealing with this question and approves the application of the doctrine when the result of the professional treatment is of such a character that medical testimony is not necessary to prove it. As illustrative of such a case the court said: 'If a patient should visit a surgeon for the purpose of having a mole removed from the right foot and awoke from an anesthetic minus his left arm, it is certain that some satis-

factory explanation would be required to stop the fact itself from broadly proclaiming the negligence of the surgeon.' The illustration is followed by a statement which draws a clear distinction between the character of cases where the doctrine is sought to be applied; the cases where the question of negligence depends upon the merits of a diagnosis and scientific treatment, and the cases where some ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject.

"The principle seems clear. The *res ipsa loquitur* doctrine rests upon the inference of negligence drawn from the fact that the injury was not one which would ordinarily have happened if those having the management used proper care. But an inference is a deduction which the reason of the jury makes from the facts proved. Code Civ. Proc., § 1958. Hence, when the facts can be proved by competent evidence, independent of scientific or expert opinion, the reason of the jury would permit an inference of negligence drawn from the proved facts. But when proof of those facts depends wholly upon scientific or expert opinion, and all the testimony offered for that purpose demonstrates that there was nothing more than an error of judgment, and fails to show a want of ordinary care, diligence, and skill, there are no proved facts upon which an inference of negligence may be founded. Mere proof that a diagnosis was wrong or that a treatment was unsuccessful will not support a verdict. *Patterson v. Marcus*, 203 Cal. 550, 552, 265 P. 222; *Hall v. Steele*, 193 Cal. 602, 605, 226 P. 854; *Markart v. Zeimer*, 67 Cal.App. 363, 364, 227 P. 683; *Johnson v. Clarke*, 98 Cal.App. 358, 361, 276 P. 1052.

"The true rule, as we understand it, is this: Ordinarily, negligence on the part of a physician or surgeon must be proved by expert evidence (*Perkins v. Trueblood*, 180 Cal. 437, 443, 181 P. 642; *Patterson v. Marcus*, 203 Cal. 550, 553, 265 P. 222; *Houghton v. Dickson*, 29 Cal.App. 321, 325, 155 P. 128), and when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive. (*Wm. Simpson C. Co. v. Industrial Acc. Comm.*, 74 Cal.App. 239, 243, 240 P. 58; *Johnson v. Clarke*, 98 Cal.App. 358, 364, 276 P. 1052.) Hence, when the expert evidence fails to show negligence on the part of the physician or surgeon, and

there is no evidence of an independent act or omission within the common knowledge of laymen, there is no ground upon which the jury may base an inference of negligence, and in such a case a nonsuit is proper. *Patterson v. Marcus*, supra; *Johnson v. Clarke*, supra; *Donahoo v. Lovas* [105 Cal.App. 705], 288 P. 698."

Nothing therein said prevents the application of *res ipsa loquitur* doctrine to the present case. Scientific or expert opinion is not required herein because we are not involved with negligence in the diagnosis or treatment of a human ailment. The testimony of experts is necessary to establish the facts concerning the location and function of the external peroneal nerve, the location of the crucial and external lateral ligaments of the left knee, the location of the operative fields, and the extent to which the external peroneal nerve is involved in the operation which defendants undertook to perform. But once these facts are established, the inference of negligence is one which may be drawn by the application of the common knowledge of laymen.

Defendants also rely upon *Markart v. Zeimer*, 67 Cal.App. 363, 227 P. 683, but we do not understand the question of the applicability of the doctrine of *res ipsa loquitur* to have been properly raised in that case, and further, the court made no attempt to decide whether or not the doctrine was applicable.

[4,5] We pass next to the question of the propriety of the court's action in granting the nonsuit and directed verdict. It is well established by the authorities in this state that the doctrine of *res ipsa loquitur*, where applicable, gives rise to an "inference" rather than a "presumption". *Anderson v. I. M. Jameson Corporation*, 7 Cal. 2d 60, 66, 59 P.2d 962; *Gritsch v. Pickwick Stages System*, 131 Cal.App. 774, 782, 22 P.2d 554. Of the distinction between an inference and a presumption, the Supreme Court in *Engstrom v. Auburn Automobile Sales Corporation*, 77 P.2d 1059, at page 1063, said: "On the other hand, an inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side [i. e., the party not relying upon the inference] * * *. Of course, if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities,

an inference is not dispelled as matter of law." In that case, it was held that the "positive, unequivocal, and uncontradicted testimony" produced by the respondent was sufficient as a matter of law to dispel an inference of permissive use of an automobile relied upon by the appellant. It does not follow, therefore, that the mere presence of evidence which makes applicable the doctrine of *res ipsa loquitur*, and therefore gives rise to an inference of negligence, compels the trial court to allow the case to go to the jury. If the inference of negligence arising from the application of the doctrine is met by the introduction of evidence which rebuts the inference and that evidence meets the test laid down in the case of *Engstrom v. Auburn Automobile Sales Corporation*, supra, then the inference of negligence is dispelled from the case as a matter of law, and a nonsuit or directed verdict would be proper.

It must be emphasized first that the evidence introduced by defendant Carlson makes no attempt to explain how the nerve became severed. In fact, defendant Carlson testified, when examined by plaintiff under section 2055 of the Code of Civil Procedure, that he could not say positively that neither he nor defendant Ream severed the nerve. Defendants placed three doctors on the stand who qualified as experts. They testified that the methods followed by defendants in the course of the operation were good standard practice, as followed by surgeons of good repute in the same locality. But no one testified that the actual operation as performed was done with due care in all its details. These witnesses also testified that even though the operation were performed with due care, the external peroneal nerve would be severed in from five to nine per cent of the cases, and that the presence of scar tissue caused by the injury to the ligaments would increase the likelihood that the nerve would be severed. None of this evidence rebuts the inference of negligence in so clear and positive a manner that it may be said to be dispelled from the case as a matter of law.

Respondents rely strongly upon the evidence that the nerve will be severed in from five to nine per cent of the cases, although the operation is performed with due care. It is their argument that where such is the case, it cannot be said that the injury resulting from the operation is such as does not "ordinarily" result except when caused by negligence. In substance, this argument

is one often rejected in prior cases. Without attempting to reconcile these cases it is sufficient to say that the principles which are controlling here are that negligence is the very basis upon which the tort action is founded; that negligence must be proved to support a recovery; that such proof may be supplied by either direct or indirect evidence; that, when the plaintiff relies upon indirect evidence—the inference drawn under the *res ipsa loquitur* doctrine—this inference must be one within the conception of the ordinary layman; that it is a question of law for the court to determine whether, under all the circumstances of the particular case, the inference is a reasonable deduction from the facts proved. But in the final analysis, negligence is the essential element to be proved, and, if the jury should infer that a severance of the nerve was not the “ordinary” result of such operations but that the injury was due to want of care in the course of the operation, we could not say that such inference was unreasonable or unsupported by the facts of this case.

[6] As to defendant Ream, the record presents a different case. It is plaintiff's contention and conceded by defendants that the external peroneal nerve of the left leg was severed during the course of the operation. There is no claim that it was merely injured, and the testimony of Dr. Lawrence shows that when he operated upon plaintiff's left knee, he found the lower end of the nerve buried in the muscle under the neck of the fibula, the normal position for the nerve. But the upper end of the nerve, he testified, was found on the head of the fibula, away from its normal position. The evidence is clear, positive and uncontradicted that defendant Ream had not cut around the peroneal nerve. Defendant Ream handled the retractors, after they were placed by defendant Carlson, and cut ligatrices to prevent bleeding. The evidence shows that the peroneal nerve might be injured by pulling on it with retractors, but no claim is made in this case that the nerve was injured. The following answer made by defendant Carlson stands uncontroverted: “Q. Was there any instrument in the hands of Dr. Ream that would actually have severed that nerve? A. No.” In the light of this evidence, it is clear that under the doctrine of *Engstrom v. Auburn Automobile Sales Corporation*, supra, the inference of negligence which might arise from the application of the doctrine of *res ipsa loquitur* was completely

rebutted and dispelled from the case, by the clear, positive and uncontradicted evidence above set forth. It follows that, as the inference of negligence as to this defendant was dispelled from the case as a matter of law, the order granting a nonsuit was proper.

In applying the rule announced in *Engstrom v. Auburn Automobile Sales Corporation*, supra, we are not unmindful of the earlier decisions, such as *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 139 P. 73, 51 L.R.A., N.S., 1105, Ann.Cas.1915C, 665; *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480; *Kenney v. Antonetti*, 211 Cal. 336, 295 P. 341; *Meyer v. Tobia*, 214 Cal. 135, 4 P.2d 542; *Morris v. Morris*, 84 Cal.App. 599, 258 P. 616; *Harvey v. San Diego Electric Ry. Co.*, 92 Cal.App. 487, 268 P. 468; *Buffums' v. City of Long Beach*, 111 Cal.App. 327, 295 P. 540; *Rayl v. Syndicate Bldg. Co.*, 118 Cal.App. 396, 5 P.2d 476; *Raymer v. Vandenbergh*, 10 Cal.App.2d 193, 51 P.2d 104, and *Mintzer v. Wilson*, 21 Cal.App.2d 85, 68 P.2d 370.

These cases are overruled, in our opinion, by the *Engstrom* Case to this extent: They hold that where an inference of negligence arises by reason of the applicability of the doctrine of *res ipsa loquitur* and it is rebutted by uncontradicted testimony introduced by defendant, a conflict of evidence is presented for determination by the jury, or the court sitting without a jury in all cases, because the credibility of defendant's witnesses is to be determined by the triers of the facts. On the contrary, the *Engstrom* Case holds that the question of whether an inference is dispelled from the case may become a question of law to be decided by the court, and that when the inference “is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt,” it is dispelled from the case as a matter of law, even though such evidence is produced by the defendant. It was upon this same principle that we held in *Coats v. General Motors Corporation*, Cal.App., 64 P.2d 1168, that a former opinion applying an inference of bad faith, or fraud, was not the law of the case upon a new trial where new evidence was produced rebutting such inference, because the court must then determine upon all the evidence whether the inference has been dispelled as a matter of law. That case is now pending before the Supreme Court, on transfer, but, until that court rules to the contrary, we may assume that the *Engstrom* Case states

the law controlling our disposition of the instant case.

The order granting a nonsuit and the judgment of dismissal in favor of defendant Ream are affirmed. The judgment in favor of defendant Carlson is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



26 Cal.App.2d 652

RATTERREE LAND CO., Inc., v. SECURITY FIRST NAT. BANK.

Civ. 6049.

District Court of Appeal, Third District,
California.

June 1, 1938.

1. Vendor and purchaser ☞314(1)

Under contract for the sale of realty providing that, on default by purchaser, unpaid balance of purchase price should become due at vendor's option, and that vendor could enforce its rights by an action for specific performance or for recovery of balance of purchase price with interest and attorney's fees, vendor could elect to bring an action on contract for unpaid portion of purchase price without alleging elements necessary to constitute an equitable proceeding for specific performance.

2. Vendor and purchaser ☞302

Where a purchaser makes default in the payment of installments due under an executory contract for sale of realty, if contract so specifically provides, vendor may declare entire remaining unpaid portion of purchase price due and maintain an action at law to recover a money judgment for that amount.

3. Executors and administrators ☞443(5)

In an action against a deceased purchaser's executor to recover the balance of purchase price of realty due under an executory contract of sale, complaint, which did not allege that plaintiff owned realty or that a deed had been tendered to executor before action was begun, was not demurrable where it did allege that a claim for un-

paid balance of purchase price had been presented to executor and was not approved, and that plaintiff was still ready to execute a good deed. Probate Code, § 712.

4. Vendor and purchaser ☞8

A contract for the sale of realty providing that, whenever purchaser paid all sums payable thereunder, vendor agreed to convey premises to purchaser and to furnish within a reasonable time thereafter a certificate or guarantee of title showing title to be vested in vendor, free of all incumbrances, was valid even though vendor did not own realty at time of execution of contract.

5. Vendor and purchaser ☞303

Where the purchaser of realty repudiates the contract on ground of fraud or otherwise, vendor need not tender a deed to purchaser as a condition precedent to bringing an action to recover the amount due under the contract.

6. Executors and administrators ☞443(7)

Where an executor of a deceased purchaser's estate rejected vendor's claim for balance of purchase price due under executory contract for sale of realty and also charged that contract was void for fraud, it was not necessary for vendor to allege as a condition precedent to right of maintaining action against executor to recover balance of purchase price due that vendor had tendered to executor a good and sufficient deed, since executor in effect repudiated contract and waived tender. Probate Code, § 712.

7. Appeal and error ☞1170(3)

In action to recover balance of purchase price due under executory contract for sale of realty, even if complaint should have affirmatively alleged that plaintiff owned realty, failure to do so was not reversible error in view of constitutional provision declaring that no judgment should be set aside for any error in any matter of pleading. Const. art. 6, § 4½.

8. Appeal and error ☞907(3)

On appeal on judgment roll alone from judgment for plaintiff in action to recover balance of purchase price due under executory contract for sale of realty, in absence of evidence adduced, reviewing court had to assume that there was adequate proof received without objection that plaintiff owned property and that a deed was tendered in accordance with terms of contract or that tender was waived by defendant, even

though complaint contained no allegations to that effect.

Appeal from Superior Court, Los Angeles County; L. T. Price and Charles L. Bogue, Judges.

Action on a contract by the Ratterree Land Company, Inc., against the Security First National Bank, as executor of the estate of Mary C. Fourl, deceased, to recover the unpaid portion of the purchase price of realty according to the terms of the contract, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

E. T. Young, of Los Angeles, for appellant.

Walter Gould Lincoln, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment and order overruling its demurrer, on the theory that the complaint fails to state a cause of action for specific performance of a contract to sell real estate. It is asserted the complaint is fatally defective for the reasons that it fails to allege: 1. Adequacy of consideration; 2. That the contract was just and reasonable, and, 3. That the vendor tendered to the purchaser a deed of conveyance of the property. The appeal is upon the judgment roll only. The sole issue is the alleged insufficiency of the allegations of the complaint to state a cause of action for specific performance.

The appellant has clearly misconstrued the nature of the action. It does not purport to be a suit for specific performance. It is an action on a contract to recover the unpaid portion of the purchase price of real property according to the terms of the instrument.

The plaintiff owns lot 42, Tract 9758, in Los Angeles county. May 9, 1930, it executed a written contract to sell the lot to Mary C. Fourl for \$5,000, upon instalment payments. The contract provides that:

"Should default be made in the payment of any installment of principal or interest when due, * * * the whole unpaid balance of said purchase price * * * shall become due and payable at the option of Seller, which may thereupon at its option, without notice of any kind to Buyer other than the filing of suit and service of papers

therein, enforce its rights hereunder by forfeiture of all Buyer's rights under this contract, * * * in which case Seller may retain as rental for said premises all sums theretofore paid * * *, or Seller may * * * enforce its rights hereunder by an action for specific performance * * or for the recovery of the balance of the purchase price with interest, * * * together with attorney's fees in a reasonable sum."

The sum of \$2,500 was paid on the contract. The purchaser defaulted in her payments after November 3, 1931. There was then due upon the contract the sum of \$3,288.46, including unpaid interest on deferred payments. Mary C. Fourl died March 31, 1933. Upon proceedings duly had, the defendant, Security First National Bank, was appointed executor of her estate. A claim for the unpaid portion of the purchase price, together with interest and counsel fees, was served on the executor and filed in the estate. The claim was deemed to have been rejected. Notice of default was also served by the plaintiff in which its option was exercised to declare the entire unpaid portion of the purchase price to be due and payable. This suit for a money judgment for the unpaid portion of the purchase price of the land, together with accumulated interest and counsel fees, was filed September 5, 1934. The contract, notice of default and claim were attached to the complaint as exhibits thereto. The foregoing facts were alleged in the complaint, together with the assertion that the plaintiff, because of default in the payments of instalments, had elected to declare the unpaid portion of the purchase price of the land to be due and payable, and that it had previously offered to execute and deliver to the executor a good and sufficient deed of conveyance to the real property, which was refused. It was also alleged that the plaintiff had fully performed all of the conditions of the contract on its part. The prayer of the complaint asked for a money judgment for the unpaid portion of the purchase price of the land in the sum of \$3,288.46 and interest, together with counsel fees in the sum of \$500. The complaint did not specifically allege that the land was worth \$5,000, that the consideration for the purchase price was adequate, or that the contract was just and reasonable. A general demurrer to the complaint was overruled on the theory that the suit is based on the contract for the unpaid portion of the purchase price of the land, and,

upon the contrary, that it is not a suit for specific performance. The executor filed an answer and cross-complaint, denying the essential allegations of the complaint and affirmatively charging that the contract was procured by means of fraud and misrepresentations. The answer and cross-complaint also alleges that the plaintiff represented to the purchaser that the property was reasonably worth the sum of \$5,000, which was untrue. The plaintiff answered the cross-complaint, admitting that it represented the value of the land to be reasonably worth \$5,000, which representation was true.

The court tried the case sitting without a jury. Findings were adopted favorable to the plaintiff on every essential issue, including the offer to execute and deliver to the executor a good and sufficient deed of conveyance to the land, which was refused. Judgment was thereupon rendered in favor of plaintiff in the aggregate amount of \$4,159.78, which includes an attorney's fee allowed in the sum of \$500. The judgment provides that it is subject to the execution and delivery to the defendant of a good and sufficient deed of conveyance of the land. From that judgment the defendant has appealed.

The appeal is presented on the judgment roll only. The evidence is not before this court. In the appellant's opening brief it says: "The sole question involved on this appeal is the sufficiency of the complaint to state a cause of action."

[1] We are of the opinion the complaint states a good cause of action for a money judgment based on the contract for the unpaid portion of the purchase price of the land, together with interest and counsel fees, according to the terms of the written agreement. The suit is not one for specific performance, and the plaintiff was not compelled to rely on that remedy. It had a right to elect to bring the action upon the contract for the unpaid portion of purchase price of the land, without alleging the elements necessary to constitute an equitable proceeding for specific performance. In 66 Corpus Juris, page 1206, section 1069, it is said:

"Subject to rules hereafter considered requiring an election as to remedies which the vendor will pursue, and forbidding the pursuit of inconsistent remedies, the vendor, on breach of the contract by the purchaser, may bring an action for damages for the breach, or may sue in equity for specific

performance, or bring an action for the purchase price remaining unpaid."

On page 1357 of the same volume, section 1357, it is further said in that regard: "Although the contract is executory, the vendor may maintain an action at law for the unpaid purchase price, such as by covenant on the articles of agreement or an action of debt for the purchase money."

Many California authorities are cited in support of the preceding declaration of procedure.

In 25 California Jurisprudence, page 774, section 39, it is said:

"If the contract provides for payment of the purchase money in installments, a vendor may maintain an action for each installment as it becomes due. * * *

"An action for unpaid purchase money is an action *ex contractu*, proceeding upon the theory that the contract is in force, i. e., it is an action at law to recover money due under a contract, and not a suit for specific performance."

[2] For default in the payment of instalments due under an executory contract for sale of real property, where the contract so specifically provides, the vendor may declare the entire remaining unpaid portion of the purchase price due, and maintain a suit at law to recover a money judgment for that amount. *Siem v. Cooper*, 79 Cal.App. 748, 250 P. 1106. In the case last cited it is said (page 1107): "The law seems to be well settled that, under a contract such as appears in the writing attached to the plaintiff's complaint, the vendor may at his election, in the event of default in the payment of any installment, as provided for, declare the whole purchase price due and payable and institute action for the balance thereof remaining unpaid. *Smith v. Mohn*, 87 Cal. 489, 25 P. 696; *Reed v. Hickey*, 13 Cal.App. 136, 109 P. 38."

The authorities which are cited by the appellant apply only to an action for specific performance of a contract. Since we assume they do not prescribe the essential elements necessary to be included in a complaint upon a contract to recover the unpaid portion of the purchase price of land, under the circumstances of this case, it is unnecessary to further distinguish them.

[3] The complaint does not specifically allege that the plaintiff is the owner of the property in question, nor that a deed of conveyance was actually tendered to the executor before the action was commenced.

The complaint, however, does allege that a claim for the unpaid portion of the purchase price of the land was duly presented to the executor for allowance more than ten days prior to the commencement of the action, and that the claim was not approved. Under section 712 of the Probate Code, the claim was thereby deemed to have been rejected by the executor. The complaint also alleges that by the filing of that creditor's claim the plaintiff elected to exercise its option under the contract to declare the entire unpaid portion of the purchase price to be due, and that the plaintiff "did then and there, and does now offer to execute to the Executor, or to its nominee, or to any person designated by this Court, a good and sufficient grant deed conveying title to this lot, together with a certificate of title" according to the exact terms of the contract. The complaint also alleges that the plaintiff performed all of the conditions of the contract on its part. The contract was attached to the complaint as an exhibit thereto.

We are of the opinion the allegations of the complaint state a good cause of action for the balance of the purchase price of the land, pursuant to the terms of the contract under the circumstances of this case, and that the demurrer was therefore properly overruled.

[4-6] The contract for the sale of the real property was valid even though the vendor did not own the property at the time of the execution of the agreement. The contract specifically provides that "Whenever Buyer shall have paid all sums payable by him hereunder, * * * then Seller agrees to convey said premises to Buyer, * * * and to furnish within a reasonable time thereafter a certificate or guarantee of title * * * showing title to said premises to be vested in Seller free and clear of all encumbrances made, done or suffered by Seller." This conveyance, the plaintiff offered to execute and deliver to the executor when the claim was filed against the estate. By rejecting the claim, in effect the executor repudiated the contract and refused to accept the deed. The executor thereby waived a tender of the deed.

In 66 Corpus Juris, page 1369, section 1380, it is said: "Where the stipulations in the contract are dependent, the vendor may maintain an action upon showing that the purchaser has waived a tender of the deed, or where he shows a good excuse for not making or tendering the deed. Thus a tender is not essential * * * where the

purchaser has refused to carry out the purchase, * * * or where it appears that the purchaser would not have accepted a deed, if tendered."

To the same effect is the text in 25 California Jurisprudence, page 611, section 115, where it is said: "Nor is tender necessary in any case where the conduct or declarations of the purchaser are such as to show that it would be unavailing." Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398.

See, also, the text in that regard found in 24 California Jurisprudence, page 515, section 3.

In the present case it is quite evident that the actual tendering of a deed would have been unavailing. The defendant filed its answer and cross-complaint in both of which it was charged the contract was void on account of alleged fraud in procuring its execution.

It has been determined that where the purchaser of real property repudiates the transaction on the ground of fraud or otherwise, it is not necessary for the vendor, as a condition precedent to bringing the action to recover the amount due under the contract, to tender to the purchaser a deed. Teague Investment Co. v. Setchel, 44 Cal. App. 664, 186 P. 1046; Title G. & T. Co. v. Stahler, 15 Cal.App.2d 239, 59 P.2d 515.

It was therefore not necessary under the circumstances of this case for the plaintiff to allege as a condition precedent to the right of maintaining this action, that it had actually tendered to the defendant a good and sufficient deed of conveyance. That tender would have been useless.

[7, 8] Even though it be assumed, which we do not concede, that the complaint should have affirmatively alleged that plaintiff was the owner of the property, that omission is not reversible error, in view of the provisions of article 6, section 4½, of the Constitution of California, which declares that no judgment shall be set aside for any error as to any matter of pleading. In the absence of the evidence which was adduced in this case, we must assume there was adequate proof received without objection thereto, that the plaintiff owns the property in question and that a deed was either tendered in accordance with the terms of the contract or waived by the defendant. The payment of the judgment was rendered conditional upon the execution and delivery of a good and sufficient deed of conveyance to the real property.

It does not appear there was a miscarriage of justice in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



26 Cal.App.2d 602

PEOPLE v. POLLOCK.

Cr. 1625.

District Court of Appeal, Third District,
California.

May 26, 1938.

1. Homicide ☞203(1)

A dying declaration to be admissible must have been made while the declarant was laboring under the thought of imminent death.

2. Criminal law ☞335

In manslaughter prosecution, the people had the burden to prove the locus delicti in the county wherein the information charged that the crime was committed.

3. Criminal law ☞564(1)

In manslaughter prosecution, evidence was insufficient to establish venue, requiring reversal of conviction.



Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Charles Pollock was convicted of manslaughter, and he appeals.

Reversed.

T. F. Peterson, of Eureka, and Charles Reagh, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of manslaughter upon an information filed by the district attorney of Humboldt county, charging second degree murder, in that the defendant did on or about the 31st day of December, 1937, at and in the county of Humboldt, state of California, wilfully, un-

lawfully and feloniously kill and murder one Alexander Frazier, a human being. From the order denying the defendant's motion for a new trial, and the judgment of the court based upon the verdict finding the defendant guilty of manslaughter, the defendant appeals.

Upon this appeal the appellant presents as grounds for reversal the fact that no evidence was introduced at the trial showing that the alleged offense was committed in the county of Humboldt; that the record fails to establish the venue of the alleged offense; that the court erred in the admission of testimony, and particularly in the admission of a statement made by the deceased, introduced as a dying declaration; and the alleged misconduct of the deputy district attorney.

The record shows that the offense was committed in a cabin belonging to a certain Mrs. Graham, near a place called Miranda. It appears that the defendant, the deceased, and others, mostly half-breed Indians, were engaged in a drunken orgy in the cabin referred to. Owing to the fact that all of the witnesses to the affray were more or less under the influence of intoxicating liquor, just what occurred is to an extent uncertain, but it does appear that a fight was started, and in that fight, whether the deceased was one of the originators thereof, or simply participated therein, in order to quell the disturbance, it was during the fight that the deceased received at the hands of the defendant the wounds which ultimately resulted in death. The wounds were inflicted by a knife held in the hands of the defendant.

[1] We find nothing in the record as to the alleged misconduct of the deputy district attorney warranting our interference with the judgment of the trial court; nor do we find anything objectionable in the ruling of the court in allowing questions propounded to character witnesses relative to previous affrays in which the defendant may have been engaged. Nor is there anything in the statement of the deceased, introduced as a dying statement, which in and of itself would warrant a reversal. However, as for other reasons the cause must go back for a retrial, we may here state that all the authorities agree with the holding that before a dying statement is admissible, it must be shown that the declarant was laboring under the thought of imminent death. The record in this case simply shows that the decedent said that he was going to die. It is ab-

solutely silent as to whether the deceased was or was not then laboring under the thought of imminent death. The foundation for the introduction of the dying statement upon a retrial should be laid broad enough to show and to establish the fact that the statement was made when the deceased realized that he was in imminent peril of passing on.

The vital question in this cause is the failure of the prosecution to prove venue. There is not a word in the testimony showing that the alleged offense was committed in the county of Humboldt. Several witnesses spoke of Miranda. The Graham cabin was located as near Miranda. Miranda was also located as being fourteen miles from Garberville. One witness stated that he lived in Humboldt county across the river from Miranda. That is all the testimony there is in the record with regard to the place of the alleged offense.

Upon three different occasions during the course of the trial the fact that there had been no proof of venue introduced was called to the attention of the prosecuting officer, who stated that he elected to stand upon the record. There is nothing in the record, and nothing has been called to our attention, indicating that the place called Miranda is either a township or an incorporated town, or a town of the sixth class, or any legal entity of which either the trial or appellate court could take judicial notice. The record simply shows a service station and a lunch-counter or eating place connected therewith.

[2,3] We think this case is governed by the following authorities: In the case of *People v. Parks*, 44 Cal. 105, the opinion would appear to have been written to fit the instant case. It is there said: "The indictment alleges the offense to have been committed in the County of Yolo. The defendant pleaded not guilty, and it was, of course, incumbent upon the prosecution to prove the *locus delicti*. This was not done. The evidence conduces to establish that the robbery charged was committed, if at all, at the drinking saloon of Stroback, but there is nothing in the record which tends in the slightest degree to show that this saloon was situated in the County of Yolo." Here, the alleged offense took place in the cabin belonging to a Mrs. Graham,

without any testimony showing in what county the Graham cabin is located.

In *People v. Meseros*, 16 Cal.App. 277, 116 P. 679, where there was a failure to introduce any testimony as to the venue, the court said: "The venue must be proved as charged. *People v. Parks*, 44 Cal. 105; *People v. Roach*, 48 Cal. 382; *People v. Bevans*, 52 Cal. 470; *People v. Murphy*, 51 Cal. 376; *People v. Aleck*, 61 Cal. 137, 138."

In *Application of Hartwell*, 28 Cal.App. 627, 153 P. 730, this court had before it a similar failure to introduce any testimony as to the venue. We quote from the opinion as follows (page 731): "The evidence was that he 'held up' the Plumbago Mill, but there is no evidence, that the mill belonged to the Crœsus Gold Mining and Milling Company, nor is this mill shown by the evidence to be in Sierra county; the only evidence being that it is about three miles from Alleghany, which latter place is in Sierra county."

In *Re Huber*, 103 Cal.App. 315, 284 P. 509, the question as to the failure of establishing venue was again before this court. In that case the testimony showed that a certain bathtub was taken from a house situate on Mitchell's Ranch south of Copperopolis. There was no testimony showing that the Mitchell Ranch was in Calaveras county. All there was in the testimony or in the record simply went to the effect that the Mitchell Ranch was south of Copperopolis.

Taken at its best the instant case falls within the rule followed by this court in the Huber Case. The Mitchell Ranch was situate south of Copperopolis. The point called Miranda is said to be fourteen miles from Garberville.

By reason of the failure of the People to introduce in testimony facts or circumstances from which the venue could be determined in this case, in view of the authorities which we have just cited we see no escape from the conclusion that the cause must be sent back for a new trial.

The order and judgment are therefore reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

26 Cal.App.2d 606

In re KARAU'S ESTATE.**ERNST v. RICKETTS.**

Civ. 10749.

District Court of Appeal, First District,
Division 1, California.

May 27, 1938.

1. Marriage Ⓒ54

Under Nevada statute making marriage of insane person void from time of judicial declaration to such effect and California statutes making such a marriage voidable and subject to annulment before the death of either party, in proceedings in California on petitions for appointment of administrator of estate of alleged wife, one of which petitions was filed at request of alleged husband, validity of marriage, which was contracted in Nevada, could not be attacked on ground that alleged wife was insane. Civ. Code, § 82; § 83, subd. 3; Comp.Laws Nev. § 4067.

2. Marriage Ⓒ54

Marriages which are void from the beginning may be collaterally attacked and declared void in any proceeding wherein the question may arise, before or after the death of either party.

3. Marriage Ⓒ54

Provisions of the Civil Code making marriage of insane person voidable and subject to annulment before the death of either party are exclusive and controlling as to annulment regardless of degree of unsoundness of mind, and such a marriage is not void from the beginning, notwithstanding another provision of the Code relating to conveyances and contracts generally. Civ.Code, §§ 39, 82; § 83, subd. 3.

4. Marriage Ⓒ54

Under Nevada statute making marriage of insane person void from time of judicial declaration to such effect, such a marriage is valid until the decree of annulment is entered. Comp.Laws Nev. § 4067.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Proceedings on the petitions of C. W. Ricketts and Clara Ernst for appointment as administrator of the estate of Clemence Karau. From an order appointing C. W. Ricketts administrator, Clara Ernst appeals.

Affirmed.

Eugene B. Grattan and M. G. Del Muntolo, both of San Jose, for appellant.

Harvey C. Miller, of San Jose, and C. W. Ricketts, of Los Gatos, for respondent.

KNIGHT, Justice.

The respondent, C. W. Ricketts, was appointed administrator of the estate of Clemence Karau, deceased, and Clara Ernst, a surviving sister of the decedent, appealed.

The decedent died on April 12, 1936, and two petitions for letters of administration were filed, one by respondent at the written request of the decedent's husband, Robert Karau, and the other by appellant, who filed also written objections to the appointment of respondent. The ground of objection relied on was that at the time of the marriage ceremony between the decedent and Karau, which took place in Reno, Nevada, on November 28, 1931, approximately four and a half years prior to the death of the decedent, she was "mentally incapable to consent to or enter into, or be a party to a contract of marriage, and was at said time wholly without understanding and insane * * *."

[1] At the hearing of the petitions the fact of the marriage was established by the testimony of Karau; the marriage certificate was produced and received in evidence, and in connection therewith Karau testified that following their marriage they lived together for three years and eight months. On cross-examination counsel for appellant sought to interrogate the witness as to the mental condition of the decedent at the time of the marriage, but on respondent's objections he was not permitted to pursue such inquiry, or to introduce any testimony, which he claimed would show that at the time of said marriage the decedent "was wholly without understanding, was a moron, an imbecile and a lunatic". The basis of the court's ruling was that after the death of a spouse the validity of the marriage cannot be made the subject of a collateral attack in a probate proceeding of this kind upon the ground of the mental incapacity of the spouse at the time of the marriage ceremony. We are of the opinion that the probate court was justified in so holding.

[2] While the legislature of this state in the exercise of its control of the subject of marriage and its authority to fix the conditions under which the marital status may be created and ended, as well as the effect of an attempted creation of the sta-

tus, has denounced certain marriages void from the beginning, which under the general rule may be collaterally attacked and declared void in any proceeding wherein the question may arise, whether during the life time of both of the parties or after the death of either of them, it has also classified certain other marriages as being only voidable, and as to them it has prescribed when and by whom such marriages may be attacked and declared void. In re Estate of Gregorson, 160 Cal. 21, 116 P. 60, L.R.A.1916C, 697, Ann.Cas.1912D, 1124. Those denounced as being an absolute nullity from the beginning are incestuous marriages (Civ.Code, sec. 59), marriages of white persons with negroes, Mongolians, members of the Malay race or mulattoes (Civ.Code, sec. 60, as amended by St.1933, p. 561), and (except under certain specified conditions) a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband and wife. (Civ.Code, sec. 61.) But among the group classified as voidable is a marriage with a person of unsound mind, unless the person of unsound mind, after coming to reason, freely cohabit with the other as husband or wife (Civ.Code, sec. 82); and as to such marriages the legislature has declared that the same may be annulled "by the party injured, or relative or guardian of the party of unsound mind, *at any time before the death of either party.*" Civ.Code, sec. 83, subd. 3. (Italics ours.) In discussing the right of annulment of voidable marriages embraced within said section 82 the court in Re Estate of Gregorson, supra, points out that they stand on a ground different from marriages declared to be absolutely void, and in this respect the court goes on to say that no general right to have such marriages declared null is given; that the persons who may bring the action, and the time within which they may bring it, are limited by section 83. "Thus," continues the court, "where the cause is unsoundness of mind, the action may be brought 'by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.' These marriages are not declared to be void as are those mentioned in sections 59, 60, and 61. The fact that they are not so declared and that the right to have them annulled is closely limited as to both persons and time indicates clearly the intent of the Legislature that these marriages are to be regarded as merely voidable, and that the only manner of avoiding them is that

provided by the Code. If the parties who are alone recognized by the statutes as entitled to have the marriage annulled do not, during its existence, see fit to avoid it, a stranger to the marriage should not be permitted to question its validity in a collateral proceeding." (Page 62).

[3] Appellant contends, however, that if it can be established that the person of unsound mind was "entirely without understanding" the marriage, under the provisions of section 39 of the Civil Code relating to conveyances and contracts generally, is an absolute nullity and void from the beginning; and that therefore if the collateral attack is based on that ground, the marriage is taken out of the operation of said sections 82 and 83 relating to voidable marriages, and is subject to collateral attack at any time and in any kind of a proceeding. Such contention is based mainly on certain other language used by the court in the Gregorson Case, supra, by way of analogy in discussing the determinative question there involved. Admittedly, however, the court in that case did not so hold. The language relied on was obviously dictum, and in our opinion it was the legislative intent that the provisions of said sections 82 and 83 should be exclusive and hence controlling in the matter of annulment of marriage contracts upon the ground of unsoundness of mind, regardless of the degree of the unsoundness of mind. This conclusion is based in part upon the fact that under the provisions of said section 82 the marriage of a person of unsound mind is not even voidable if "such party, after coming to reason, freely cohabit with the other as husband or wife."

[4] Nor was the marriage in question here void from the beginning under the law of the state of Nevada, where it was contracted. As said by the court in Re Estate of Gregorson, supra, "In some of the states the statutes declare that the marriage 'shall be void from the time its nullity shall be declared by a court of competent authority.' It has been held that the effect of this is to make the marriage valid until the decree of annulment has been entered. Eliot v. Eliot, 77 Wis. 634, 46 N.W. 806, 10 L.R.A. 568; State v. Cone, 86 Wis. 498, 57 N.W. 50." The state of Nevada has such a statute. (Sec. 4067, Nevada Compiled Laws of 1929). It reads: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when fraud

shall have been proved, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void *from the time its nullity shall be declared by a court of competent authority.*" (Italics ours.)

As will be seen, therefore, under the law of neither state was the marriage here void from the beginning, and such being the case it was not subject to collateral attack after the death of the decedent in the present proceeding.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



26 Cal.App.2d 590

ATKINSON v. ZAREVICH.

Civ. 10466.

District Court of Appeal, First District,
Division 1, California.

May 26, 1938.

1. Appeal and error ⇐930(1)

Where the testimony is substantially conflicting, the appellate court, in support of the verdict, will assume the testimony of the prevailing party to be true and construe it as favorably as possible in his favor.

2. Appeal and error ⇐1002

In action to recover real estate commissions allegedly due under a written agreement, where evidence conflicted as to whether agreement was revoked by defendant prior to plaintiff's performance, and jury found for defendant, implied finding that agreement was revoked could not be disturbed on appeal.

3. Brokers ⇐88(2)

In realty broker's action to recover commissions allegedly due under written agreement, question whether telephone conversation revoking the agreement took place prior to the time broker secured purchaser's signature to a written acceptance of defendant's offer to sell was for jury.

4. Brokers ⇐44

An agreement to pay realty broker's commissions may be revoked at any time

prior to performance by the broker, in absence of bad faith or fraud of vendor.

5. Brokers ⇐44

In realty broker's action to recover commissions under written agreement, where jury found that vendor had revoked agreement prior to time broker obtained purchaser's signature to agreement to purchase, reasons prompting the revocation were immaterial.

6. Appeal and error ⇐1066

The court did not commit prejudicial error in giving an instruction embodying a statement of the factual situation which was not supported by the evidence, where the instruction was not a formula instruction and correctly stated the law, and other instructions correctly set out the factual situation.

Appeal from Superior Court, Santa Clara County; P. F. Gosby, Judge.

Action by W. L. Atkinson, doing business under the fictitious firm name and style of W. L. Atkinson & Company, against A. Zarevich, to recover real estate commissions alleged to be due under a written agreement. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

J. M. Atkinson, of San Jose, for appellant.

John J. Jones, of San Jose, for respondent.

KNIGHT, Justice.

This is an appeal by plaintiff from a judgment in defendant's favor based on the verdict of a jury, in an action to recover real estate commissions alleged to be due under a written agreement dated January 27, 1936, whereby defendant agreed to sell a portion of his ranch property for the sum of \$19,000, or the whole thereof for \$37,000, and to pay a commission of five per cent on the sale price. On January 30, 1936, plaintiff procured a purchaser named T. S. Furtado, who agreed in writing to buy the property on the terms stated in the agreement; but defendant claimed he revoked the agreement to sell prior to performance by plaintiff, and he pleaded such revocation by way of special defense, and the jury found in his favor. As main grounds for reversal plaintiff contends that the evidence is insufficient to support the

implied finding of the jury that there was a legal revocation of the agreement prior to performance by plaintiff, it being argued in this behalf that the evidence introduced by defendant in support of his special defense was so unsubstantial that it did not even raise a conflict with the evidence introduced on behalf of plaintiff, and that therefore the trial court erred in not granting plaintiff's motion for a directed verdict.

It appears from the evidence that plaintiff had been negotiating with Furtado for several days prior to the day on which defendant signed the agreement to sell, and that Furtado had agreed to purchase a portion of the property for \$16,000, but that defendant had rejected the offer. Thereupon and on January 27, 1936, plaintiff obtained from defendant the written agreement in question, to sell part of the ranch for \$19,000 or the whole for \$37,000, and to pay the commission mentioned. Furtado then offered \$35,000 for the entire property, but defendant refused the offer; whereupon Furtado increased his offer to \$36,000 and plaintiff communicated the offer to defendant. The latter stated he would talk it over with his wife, and give plaintiff an answer the next day. On the following afternoon he met plaintiff at the latter's office. He could not remember with any degree of certainty whether the meeting took place on the afternoon of January 29th or January 30th. However, he testified that at that time he told plaintiff he could not sell the property, because his wife was not satisfied and did not want him to sell; and that plaintiff then talked to him about the matter, told him the deal was an advantageous one, and that he had better sell; that thereupon defendant told plaintiff he would go home and see what he could do—that he would take the matter up with his wife and let plaintiff know; but that after he had again discussed the matter with his wife she still refused to sell, and that consequently, on the afternoon of that same day, about 4:30 o'clock, he telephoned plaintiff's office and revoked the agreement to sell. His testimony in this regard was as follows: “* * * I took the telephone, telephoned to the girl at the office, ask if Mr. Atkinson is there; the girl said, ‘No, he went out somewhere’. I said ‘Tell Mr. Atkinson I draw that property out of the market, not for sale any more’. * * * I think she said, ‘I don't get you right’. I said a second time,

‘Tell Mr. Atkinson I put that property out of the market, not for sale any more’. I heard her say ‘All right’.”

Plaintiff's secretary testified that the telephone conversation took place on January 30th, and her version thereof was quite different from defendant's. She stated that about 5:20 o'clock on said afternoon some one called on the phone that she thought was defendant, but she was not sure; that she did not understand him, and when she asked him to repeat what he had said he hung up the phone; so she left a note for plaintiff saying that she thought that defendant had called and that plaintiff had better call him; and that the next morning when plaintiff came in she told him about the call and gave him the note. Plaintiff's testimony was also at variance with defendant's. He testified that the meeting with defendant in his office took place on the afternoon of January 30th, and that after talking over the matter of Furtado's offer of \$36,000 defendant told him to see if Furtado would not meet the price of \$37,000; that as soon as defendant left he called on Furtado and that same afternoon obtained from Furtado his written agreement to buy the property on the terms set forth in the agreement of sale. However, he did not fix the time of day he obtained Furtado's signature to such agreement, his testimony in this regard being: “Well, about 4:30 o'clock I think, something of the kind, along quite late in the afternoon.” He then went on to testify that the next morning the 31st, he went to his office and found the message left by his secretary to call the defendant; that on the same afternoon he went to defendant's home and informed defendant that Furtado had accepted the offer but defendant was just leaving, so he told plaintiff he would be in the next morning; that when defendant came in that morning, which was Saturday, the first of February, he told plaintiff for the first time that his wife was objecting to the sale, but he said he would talk to his family some more about it; that he came in the following Monday or Tuesday and informed plaintiff that his wife would not sign the deed and that he was not going ahead with the deal.

[1,2] It becomes obvious at once from the foregoing that the evidence is sharply conflicting, not only as to the date of the telephone conversation revoking the agreement to sell, but also as to what was said; and of course, under well settled rules,

where the testimony is substantially conflicting, the appellate court in support of the verdict will assume the testimony of the prevailing party to be true, and construe it as favorably as possible in his favor. Therefore, in the present case, since the jury accepted defendant's testimony as true, its implied finding that revocation of the agreement was made prior to performance by plaintiff cannot be disturbed on appeal. 4 Cal.Jur. p. 637.

[3] In his attack upon the sufficiency of defendant's testimony to establish the fact of revocation, plaintiff emphasized the uncertainty thereof as to dates and time. However, the record shows that defendant did testify positively that the meeting in plaintiff's office and his telephone conversation with plaintiff's secretary took place on the same day, and in several instances stated that they took place on January 29th. In any event, in view of the apparent conflict, the question of whether the telephone conversation revoking the agreement took place prior to the time plaintiff secured Furtado's signature to the written acceptance of defendant's offer to sell was placed squarely before the jury under proper instructions proposed by both plaintiff and defendant, one of those proposed by plaintiff being as follows: "I instruct you that if you find from the evidence that the said written offer of the defendant to sell his property was accepted by said T. S. Furtado prior to such offer being withdrawn by the defendant that such offer and acceptance became, from the date of such acceptance, a valid, binding and enforceable contract." Therefore, in view of the uncertainty in plaintiff's testimony as to the exact time of day he secured Furtado's signature, it cannot be said on appeal that the jury's finding on this issue is unsupported, even assuming the telephone conversation did take place on January 30th.

Also in his attack upon the sufficiency of the evidence plaintiff points out that in order to revoke an agreement such as we have here, the party revoking must communicate his revocation to the other party in clear and unequivocal language; and he contends that in the present case this was not done. It appears however, that defendant on several occasions testified as to what the telephone conversation was, and each time stated that after he had

twice told plaintiff's secretary to tell appellant that he had withdrawn his property from sale, she answered "all right". We are unable to agree, therefore, that defendant's testimony does not meet the requirement of the rule plaintiff relies upon. Nor is the case of *United States Farm Land Co. v. Darter*, 42 Cal.App. 292, 183 P. 696, cited by plaintiff in this connection, in point because there the court held that not only did the seller fail to notify the real estate broker of the termination of the agency, but in the correspondence between them he recognized the continued authority of the broker and only sought to secure a modification as to the time and condition of payment of the commission. Such is not the case here.

[4,5] Plaintiff further contends that defendant's revocation was ineffective because he knew that negotiations for a sale were pending; also that assuming defendant's wife did refuse to sign a deed to complete the transaction, such fact was not sufficient justification for the rescission of the agreement to sell. The prevailing rule is, however, that in the absence of bad faith or fraud an agreement to pay real estate broker's commissions, such as we have here, may be revoked at any time prior to performance by the broker. Therefore, in the present case, in view of the jury's supported finding that there was such revocation prior to the time plaintiff obtained Furtado's signature to the agreement to purchase, the reasons prompting the revocation would seem to be immaterial.

[6] Plaintiff also urges that the court committed prejudicial error in giving the jury an instruction embodying a statement of the factual situation which plaintiff contends finds no basis in the evidence. However, it appears that the instruction was not a formula instruction, and that it correctly stated the law; also that in other instructions the factual situation was correctly set out. It cannot be reasonably held, therefore, that the jury was misled by the giving of the single instruction challenged by plaintiff.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

TUCKER et al. v. NICHOLSON.*
Civ. 11425.

Will H. Winston, of Long Beach, for respondents.

District Court of Appeal, Second District,
Division 1, California.

May 31, 1938.

Rehearing Denied June 24, 1938.

Hearing Granted by Supreme Court
July 28, 1938.**1. Executors and administrators** Ⓒ221(4)

In action against executrix on rejected claim for contribution, finding that judgment against plaintiffs and executor's testator had been paid on certain date was sustained by record showing that one of the plaintiffs had paid into escrow amount due to judgment creditor, that escrow agent was instructed to deliver an assignment of the judgment to trustee for plaintiffs, and that on certain date the judgment was paid and satisfaction of judgment filed by trustee. Code Civ.Proc. § 709.

2. Contribution Ⓒ7

Where one of two defendants pays a joint judgment, he will not be allowed to enforce it against the codefendant for a greater sum than is legally chargeable against him as his proportion of the debt. Code Civ.Proc. § 709.

3. Executors and administrators Ⓒ202(1)

Where executrix' testator was one of nine against whom a joint and several deficiency judgment had been rendered and other judgment debtors had satisfied judgment and received an assignment thereof from the judgment creditor, testator's estate was liable to contribute one-ninth of the total amount of the judgment and no more, in absence of showing of insolvency of any of the nine judgment debtors. Code Civ.Proc. § 709.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Charles H. Tucker and others against Grace Freeman Nicholson, executrix of the last will and testament of Arthur J. Nicholson, deceased, on a rejected creditor's claim seeking contribution from the estate for one-fourth of a deficiency judgment, which had been assigned to the plaintiffs. From an adverse judgment, the defendant appeals.

Judgment modified, and, as modified, affirmed.

Newton Todd and Fred A. Watkins, both of Long Beach, for appellant.

YORK, Presiding Justice.

The respondents herein together with Arthur J. Nicholson (now deceased) and several other persons, purchased a parcel of real property, had the legal title thereof conveyed to the Western Trust & Savings Bank, as trustee, and jointly executed a promissory note in favor of Marion M. Lamkin for the balance of the purchase price, said note being secured by a mortgage upon said real property. Said mortgage was foreclosed and a deficiency judgment in the sum of \$16,104.37 and interest was entered on August 23, 1932, against nine makers of the note.

On June 28, 1933, an escrow agreement was entered into by and between said Marion M. Lamkin, the judgment creditor, and Frank W. Barnes, one of the respondents herein, and on said date respondent Barnes paid into escrow the amount due on the judgment and there was delivered into said escrow an assignment of the judgment in favor of Will H. Winston, the attorney and trustee for respondents. Thereafter, on July 22, 1933, the money so paid into escrow was delivered and paid to the judgment creditor Lamkin and the assignment of the judgment was delivered to said Will H. Winston. On July 19, 1934, said Will H. Winston made and filed of record a satisfaction of the judgment, and on the same day, pursuant to the terms of section 709 of the Code of Civil Procedure, the three respondents filed a notice and demand for contribution from the other six judgment debtors, of whom A. J. Nicholson was one. Said A. J. Nicholson died on October 31, 1935, and during the course of administration of his estate, respondents filed a creditor's claim seeking contribution from said estate, which claim was rejected on April 17, 1936, whereupon respondents commenced the present action against the executrix of said estate upon such rejected claim. The trial court rendered judgment in favor of respondents and against the executrix of said estate for one-fourth of the amount of the deficiency judgment, together with interest and costs.

It was found by the court: "That on the 19th day of July, 1934, plaintiffs herein paid said Judgment in full including interest from the date of said Judgment

*For subsequent opinion see 84 P.2d 1045.

at the rate of seven per cent (7%) per annum to the 22nd day of July, 1933, and a Satisfaction of Judgment was filed in the above entitled Court on July 19, 1934, and on said date, July 19, 1934, a Notice and Demand for Contribution was filed by the plaintiffs herein setting forth that they had paid the Judgment and had caused Satisfaction to be filed and claiming and demanding contribution from the defendants. * * * That said Notice of Contribution and Demand was given in accordance with Section 709 of the Code of Civil Procedure of the State of California. That an Abstract of Judgment was recorded on October 5, 1932, in Book 11815 at Page 206 of Official Records of Los Angeles County, California. That no part or portion of said Judgment has been paid by any of said defendants herein named except the plaintiffs to this action and that said Judgment is still in full force and effect."

Appellant here urges that the finding as to payment of the judgment on July 19, 1934, is unsupported by the evidence; that respondents did not comply with the provisions of section 709 of the Code of Civil Procedure, and that in no event could respondents receive from appellant more than $\frac{1}{12}$ th of the original judgment.

[1] The finding of the court that the judgment was paid on July 19, 1934, is fully sustained by the legal inferences that should be drawn from the record. The escrow instructions, which are attached to the stipulation of the parties herein, show that respondent Barnes paid into escrow the amount due to the judgment creditor, Marion M. Lamkin, and that the escrow agent was instructed to deliver to Will H. Winston, the attorney and trustee for respondents, an assignment of the judgment in consideration for the payment to said judgment creditor of the sum of \$5,-816.61 in cash and a promissory note for \$11,000 executed by respondent Barnes. It is clear from the undisputed facts and from the face of the record that this cash and note were delivered to said judgment creditor on July 22, 1933, in consideration for the assignment and not as payment upon the judgment, and that the judgment was not actually paid until July 19, 1934, when Will H. Winston, the assignee named in the aforementioned assignment, filed his satisfaction of the said judgment.

It is provided by the terms of section 709 of the Code of Civil Procedure that

"When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others. * * * In such case the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket."

Respondents caused to be filed on July 19, 1934,—the day on which the judgment was paid and satisfied of record,—their notice of payment and claim to contribution from their codebtors, which was in strict compliance with the terms of said section 709, *supra*.

The original deficiency judgment was for the sum of \$16,104.37, and in the instant case the trial court rendered judgment against appellant for the sum of \$4,026.09, or one-fourth of the amount of said deficiency judgment. Appellant claims this was error, and that any judgment rendered against appellant in any event should not have exceeded one-twelfth of the amount of said deficiency judgment. In support of such contention evidence was introduced at the trial to show that appellant's testator owned a one-twelfth interest in the property given as security for the mortgage, in the foreclosure of which the deficiency judgment was rendered.

Respondents urge that in the case at bar "three men, jointly and severally liable with nine other codefendants jointly and severally liable on a promissory note against whom a joint and several judgment has been rendered, have paid the judgment in full. A fourth is asked to contribute. There is only one fair, equitable and just conclusion and that is that the A. J. Nicholson Estate should be compelled to pay one-fourth of the judgment."

As a matter of fact the record discloses that the deficiency judgment was rendered, not against twelve persons but against nine persons only, numbering among them the three respondents and A. J. Nicholson, now deceased. At the trial of the instant

action, R. E. Hagenbruch, trust officer of the Western Trust & Savings Bank, testified that the declaration of trust, which was entered into at the time the Lamkin mortgage was executed, recited the interests of the owners of the property given as security for such mortgage as follows: Walter F. Lineberger, $\frac{1}{12}$ th; Ethel D. Baker, $\frac{1}{12}$ th; John P. Mills, $\frac{1}{12}$ th; Florence H. Lineberger, $\frac{1}{12}$ th; A. J. Nicholson, $\frac{1}{12}$ th; George H. Besancon, $\frac{1}{12}$ th; L. Roy Myers, $\frac{1}{12}$ th; S. J. Abrams, $\frac{1}{12}$ th; F. W. Barnes, $\frac{1}{12}$ th; and Charles H. Tucker, $\frac{1}{12}$ th. The deficiency judgment omits the names of Ethel D. Baker and Florence H. Lineberger, and adds the name of John S. Lineberger.

[2, 3] In the action at bar we have before us a joint and several judgment for deficiency rendered against nine of the original makers of the note, three of whom are asserting a statutory right of contribution from the other six. It appears to be the rule that "where one of two defendants pays a joint judgment, he will not be allowed to enforce it against a co-defendant for a greater sum than is legally chargeable against him as his proportion of the debt". 6 Cal.Jur. 524, citing *Williams v. Riehl*, 127 Cal. 365, 59 P. 762, 78 Am.St.Rep. 60; *Coffee v. Tevis*, 17 Cal. 239. It was said in the case of *Williams v. Riehl*, supra, at page 371, 59 P. at page 764: "The respondents, by paying the plaintiff, and taking an assignment of the judgment, only became entitled to use it for the purpose of enforcing contribution from their co-sureties or payment from their principal. They are only subrogated to the rights of the plaintiff for the purpose of using the judgment in order to protect themselves and their co-sureties, and for the purpose of compelling contribution. This is not a proceeding in equity, and no claim is made that any co-surety is insolvent. The law presumes that they are solvent. Respondents, therefore, were entitled to execution against appellant for an aliquot part of the debt, based on the whole number of co-sureties. They are liable to contribute in the proportion of the respective amounts or penalties for which they became surety." The question of insolvency did not arise in the instant case, therefore, the judgment debtors must be presumed to be solvent and liable for an aliquot part of the judgment based upon the whole num-

ber of such judgment debtors, to-wit, nine. Since appellant's testator was one of the nine against whom such joint and several deficiency judgment was rendered, it is obvious that his estate can be compelled to contribute no more than one-ninth of the total amount of the original judgment.

The judgment is affirmed, except as to the amount of the instant judgment which should have been rendered for only one-ninth of the original deficiency judgment; therefore, the trial court is directed to enter judgment in accordance with the views herein expressed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 641

PEOPLE v. MOORE et al.

Cr. 1617.

District Court of Appeal, Third District,
California.

May 31, 1938.

Criminal law ⇐1182

Where no brief was filed, cause was regularly placed on calendar for oral argument, and no appearance was made for either accused, convictions were affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Pat Moore, Oliver Smith and Percy C. Smith were charged with burglary in the first degree, and Pat Moore and Oliver Smith were convicted thereof, and they appeal.

Affirmed.

James F. Gaffney, of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants were convicted in the superior court of the county of Sacramento of the crime of burglary of the first degree.

The transcript on appeal was filed in this court on March 23, 1938. No brief on appeal has been filed in behalf of either defendant. The cause was regularly placed on the calendar for oral argument for May 9, 1938. No appearance was made in behalf of either appellant. On the court's motion defendants were allowed 15 days within which to file their opening briefs. No briefs have been filed in behalf of either appellant, and the time for filing briefs has not been extended.

Pursuant to the provisions of section 1253 of the Penal Code the judgments of convictions of each defendant, and orders are affirmed.

crime of burglary of the second degree, a felony.

The transcript on appeal was filed in this court April 6, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 1, 1938. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.



26 Cal.App.2d 642

SISCHO v. CITY OF LOS BANOS.*

Civ. 5847.

District Court of Appeal, Third District,
California.

May 31, 1938.

Rehearing Denied June 30, 1938.

26 Cal.App.2d 659

PEOPLE v. COOPER.

Cr. 1629.

District Court of Appeal, Third District,
California.

June 1, 1938.

Criminal law ¶1182

Where transcript on appeal from conviction for second degree burglary was filed, but no brief was filed on defendant's behalf, and cause was regularly placed on calendar for oral argument, but no appearance was made for defendant when case was called for hearing, conviction was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Norman Earl Cooper was convicted of burglary of the second degree, and he appeals.

Affirmed.

Herbert E. Paul, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Stanislaus county of the

1. Appeal and error ¶1050(1)

In action against city for injuries from fall allegedly resulting from defective condition of sidewalk and entrance and exit to store, admission of plaintiff's testimony that mayor told plaintiff city was "very lucky" in that it carried insurance was prejudicially erroneous, where mayor's opinion was irrelevant to issues involved.

2. Appeal and error ¶925(3)

In negligence action against city, where in plaintiff, in response to interrogation of his counsel as to substance of conversation with mayor shortly after the accident, testified that mayor stated city was "very lucky" in that it carried insurance, reviewing court was required to presume that counsel knew the answer plaintiff would give, and that answer would merely show that city carried insurance.

3. Municipal corporations ¶800(1)

Where pedestrian slipped on wet tiling leading from sidewalk line to store entrance and landed on sidewalk alongside store, city was not liable for pedestrian's injuries, even if sidewalk was in a defective condition.

4. Municipal corporations ¶788(3)

Under the Public Liability Act, city would not be liable for injuries to pedestrian

*Rehearing denied 80 P.2d 1020.

who fell on sidewalk which had slope so negligible it was not ordinarily perceptible to casual observation, where superintendent of streets had no actual notice of defect in sidewalk. St.1923, p. 675, § 2.

5. Municipal corporations ~~C~~755(1), 763(1)

Cities are not insurers as respects the use of sidewalks by pedestrians, and are only required to use reasonable care to see that sidewalks are suitable for such use.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by L. A. Sischo against the City of Los Banos and others for injuries from a fall allegedly resulting from the defective condition of a sidewalk and an entrance and exit to a store. From an adverse judgment, named defendant appeals.

Reversed.

Chester O. Hansen, of Fresno, Gregory P. Maushart, of Los Banos, Stephen P. Galvin, of Merced, and Cooley, Crowley & Supple, of San Francisco, for appellant.

C. Ray Robinson, R. R. Sischo, Willard B. Treadwell, and James D. Garibaldi, all of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff obtained a judgment against the City of Los Banos, and from this judgment the City of Los Banos appeals. The action was prosecuted not only against the City of Los Banos, but against F. H. Cromwell, Joe Morbes, and against J. H. Burke, as the superintendent of streets of the City of Los Banos. The verdict of the jury exonerated F. H. Cromwell, Joe Morbes and J. H. Burke.

The complaint alleges that at all times mentioned therein, the defendant, J. H. Burke, was the superintendent of streets of the City of Los Banos; that by virtue of being such officer, the streets of the City of Los Banos, and particularly the street and sidewalk involved in this action, were under his care, supervision and control. It is then alleged that the defendant Joe Morbes was at all times the owner of a certain building situate in the City of Los Banos, state of California, commonly known as "F. H. Cromwell's Store", (the word "Cromwell" appears also to be spelled "Cronwell"). That said building was, at

all times mentioned in the complaint, leased and occupied by F. H. Cromwell.

Paragraph VI of the complaint alleges that the City of Los Banos, and the defendant J. H. Burke, have maintained a certain public sidewalk in front of said F. H. Cromwell's store in the City of Los Banos, and that said defendants, during all of said time, invited the general public to use said sidewalk, and represented to the general public that it was a fit, proper and safe place to walk; that said sidewalk was maintained in a negligent and careless manner; that it was unsafe for persons to travel over and upon the same; and that at all times herein mentioned, and particularly on the 8th day of January, 1936, the defendants and each of them knew of the unsafe condition of said sidewalk, and maintained the same and permitted the general public to use said sidewalk without warning to the plaintiff or to the general public of the unsafe condition of said sidewalk.

Paragraph VII of the complaint alleges that at the time mentioned, to-wit, the 8th day of January, 1936, the defendants Morbes and Cromwell maintained a certain entrance and exit to said Cromwell's store in such a negligent and careless manner that it was unsafe for persons to travel over and upon the same; and that the defendants, and each of them, knew of the unsafe condition of said entrance and exit, and maintained and used said premises in such condition without warning to customers, etc.

Paragraph IX of the complaint alleges that by reason of the negligent manner of maintaining said entrance and exit from said building, and the careless and defective manner of the defendants, City of Los Banos, and defendant J. H. Burke, in maintaining and permitting said sidewalk to remain in such dangerous and defective condition, plaintiff fell and was seriously injured, etc. The degree of the injuries are not involved in this action. The verdict of the jury was against the City of Los Banos, and in favor of the other defendants named in the complaint.

The record shows that for a considerable time the City of Los Banos had maintained a cement sidewalk along side, and in front of the store known as "Cromwell's Store". From the sidewalk line leading into the store, the defendants Morbes and Cromwell had maintained an entrance or exit laid with tiling. The exact slope of this

tiling does not appear specifically stated in the record. From the junction of the sidewalk with the tiling the sidewalk sloped seven-eighths of an inch in the first foot, and averaged fifty-eight hundredths per foot for three feet adjacent to the property line. It appears that the ordinary slope of a sidewalk is one-quarter inch to the foot. The testimony in the record is conclusive to the effect that one would not notice the rise or slope of the sidewalk, or that there was any grade there in walking over the same; that in order to detect the same one would have to be looking at the sidewalk with some degree of keenness of observation.

The sidewalk in front of the store was finished with a metal trowel, pursuant to an ordinance of the City of Los Banos. It appears that there are two methods of finishing sidewalks: one with a metal trowel, which leaves the sidewalk rather smooth; the other with a wooden trowel, which leaves a rougher surface.

The defendant Burke testified that he had been the superintendent of streets for eight and one-half years; that he knew of the entrance to the Cromwell store; that he had gone along the sidewalk looking for trouble; that the sidewalk there had not impressed him as being in a dangerous condition; that he had never heard anyone speak of the strip of sidewalk in question; no one had ever mentioned to him that there was a slope in the sidewalk in front of the Cromwell store; that he had never heard of anyone slipping on the sidewalk. The Sidewalk Ordinance of the City of Los Banos calls for a topping to be troweled with a steel trowel; that if the sidewalk in front of Cromwell's store was a hazard, there were ten thousand hazards to the block in most any city that he had been in. All the testimony in the record is to the effect that there was nothing in the construction of the sidewalk that rendered it inherently or structurally dangerous to its use by pedestrians; that pedestrians would use the sidewalk over and over without noticing any variation in the level thereof, unless special attention was paid or attracted thereto.

While the slope, grade and construction of the sidewalk is given particular attention in the testimony, and the burden of the argument of counsel relates thereto, the testimony in the transcript shows beyond controversy that the cause of the injury suffered by the plaintiff did not arise

from, or depend upon, the alleged unsafe condition of the sidewalk. It may be here stated that a slight rain was falling on the date of the accident, and that the tiling, from the sidewalk line to the store entrance, was wet. The testimony of the plaintiff shows conclusively that the cause of the injury arose from the plaintiff slipping upon the tiling, and not upon the sidewalk. As to how his injuries were sustained, and the cause thereof, is shown by the plaintiff's own testimony, which we herewith set forth:

"Q. Now, when you were being carried back into the store, did you have an opportunity to observe whether you left any mark on that tile and walk? A. I looked to see what particularly caused my fall; in packing me back I looked right here where I slipped and the mark of my foot was right on the tile, slid over in that manner and the right foot there was a streak that went off here for a foot or so (indicating).

"Q. On the tile or on the pavement? A. On the pavement.

"Q. Now, Mr. Sischo, with reference to the marks nearest to you as you were going in and what would have been the left mark coming out, and with reference to the tile and the sidewalk? A. It was, the mark from here, right here on this tiling as my foot had gone just flat that way, slid right over it.

"Q. Now, how far did that mark extend on to the tiling? A. Well, the biggest part of it was on the tiling.

"Q. How much was on the tiling? A. I would say practically all of it, just a slight blur, just as I have it, just about as it happened.

"Q. Which way did the two or three inches run, did that run north and south or east and west? A. It would be wider this way, and shorter this way.

"Q. That is the wide mark. We will call north and south and the narrow part was east and west. A. No—yes, that is correct. You see the street runs in a northeasterly direction and southeasterly direction.

"Q. So then the most of that mark, that is, the four or five inch part, was on the tiling? A. Yes.

"Q. How wide was the other mark? A. Well, it was a mark about like your finger, maybe not that wide, just a straight streak.

"Q. And how long? A. Oh, I should say just eight or ten inches."

Referring to his slipping on the tile with his left foot, plaintiff testified:

"Q. Your testimony is it was made by the ball of my foot? A. The ball of my foot, as I was up on the ball of my left foot it shot out from under me."

"Q. You could tell that by looking at the marks? A. Not only the mark, I know that is the foot that shot out from under me."

The verdict of the jury exonerating all of the parties save the City of Los Banos, and finding of verdict against the city, irrespective of the testimony which we have just set forth, is readily understood when we turn to the transcript and find that the following testimony was introduced over the objection of counsel for the city. We here set forth the question and answer, which fully explains the basis for the jury's action:

"Q. Now, Mr. Sischo, now what was the substance of the conversation that you had with Joe Toscano, the mayor of the city, immediately after, or shortly after the accident, that took place in the hospital at the time and manner indicated by you? A. Well, the start of that conversation of course was about myself, how I was getting along, and how I felt, and how I was resting, and that he expressed his sympathy, the fact that I was so seriously injured, but the conversation led to the point where he said that the City of Los Banos in this matter was very lucky, due to his forethought in the matter; he said: 'We have taken out insurance, we only took out insurance only ten days before you had fallen.'"

[1] That the admission of this testimony was prejudicially erroneous is shown by the case of *Squires v. Riffe*, 211 Cal. 370, 295 P. 517. The opinion of Toscano had no relevancy whatever to the issues involved. The cause presented simply the condition of the sidewalk, and whether the plaintiff had actually slipped thereon, or elsewhere, as his testimony demonstrated. The statement as to the insurance was not involved in anything connected with the accident, nor did it have anything to do with making plain, or otherwise, any condition of the sidewalk in question.

[2] As stated in the case of *Squires v. Riffe*, supra, it must be presumed that counsel for the plaintiff knew the answer which

his client would give, and that it would serve no purpose except to show that the city carried insurance.

[3] We may here state that our attention has not been called to a scintilla of evidence, nor have we discovered any, which indicates that the plaintiff in this action slipped other than upon the tiling in front of Cromwell's store. The mere fact that he landed upon the sidewalk along side of the store does not render the city liable, nor alter in the least the proximate cause of the plaintiff's injuries.

[4, 5] In addition to what we have said a number of photographs were introduced in evidence of the sidewalk in front of the entrance to Cromwell's store. It may be stated that an inspection of these photographs reveals that whatever variation there may be in the slope of the sidewalk, the same is not perceptible from the photographs, and while the hazardous condition of a sidewalk may be said to be a question of fact, yet when the change of the grade is so negligible that it is not ordinarily perceptible to casual observation, we think it becomes a question of law as to whether the city is, or is not maintaining a public hazard. The law seems to be well settled that cities are not insurers, but that they are only required to use reasonable care and see that public sidewalks are suitable for use by pedestrians.

A number of cases have been called to our attention where damages have been allowed, where sidewalks in and of themselves are structurally dangerous, and the hazard has been added thereto by reason of rain, snow or ice. A review thereof would serve no useful purpose, and we content ourselves with the statement that even if the injury to the plaintiff had occurred by slipping upon the sidewalk, no case has been called to our attention where the variation is so negligible as in the instant case. Again, had the plaintiff slipped upon the sidewalk instead of upon the tiling leading thereto, liability of the city would not have been fixed.

This action as against the city is based upon section 2 of the Public Liability Act, approved June 13, 1923, Stats. 1923, page 675, Act Number 5619, Deering's General Laws. That section, however, requires that the person having charge of the street or highway must have had either actual or constructive notice of the dangerous or defective condition of the public street. *Nicholson v. City of Los Angeles*, 5 Cal.2d

361, 54 P.2d 725; *Whiting v. National City*, 9 Cal.2d 163, 69 P.2d 990. There is no testimony in the record showing actual notice to the superintendent of streets, whose duty the complaint alleges it was to look after and maintain and repair the sidewalks of the City of Los Banos; nor is there anything in the record from which constructive notice might be inferred. This is apparent from the testimony, which shows that the slight variation in the elevation of the sidewalk was such that the ordinary pedestrian would walk over the same without noticing any difference in the level thereof, and that the variation thereof was so unnoticeable as not to be perceptible to the casual observer. However, as we have shown by excerpts from the plaintiff's testimony that the plaintiff slipped upon the moist or wet tile and that the alleged defective condition of the sidewalk in front of the Cromwell store was not the proximate cause of the plaintiff's injuries, and in fact had nothing to do with the plaintiff's injuries, it must be held that no cause of action is shown to exist as against the City of Los Banos.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



26 Cal.App.2d 566

CROWELL et ux. v. CITY OF RIVERSIDE et al.

Civ. 2075

District Court of Appeal, Fourth District,
California.

May 25, 1938.

Hearing Denied by Supreme Court
July 21, 1938.

1. Landlord and tenant ⇨76(2)

A covenant against subletting in lease of land to city applied to one to whom city sublet property, in view of provision in same sentence that it was consideration of lease that sublease was being made to latter person.

2. Easements ⇨1

Licenses ⇨44(2)

An instrument, purporting to be lease of land and airplane hangar thereon, with

right to use it for commercial flying and aircraft services, by one to whom land had been leased by city, did not amount to mere license or easement, but was "sublease," prohibited by basic lease of land to city, notwithstanding reservation to sublessor of right to manage aviation field.

[Ed. Note.—For other definitions of "Sublease," see Words & Phrases.]

3. Easements ⇨1

An easement may be freehold or chattel real, according to its duration, and is interest in real property in either case.

4. Landlord and tenant ⇨104

Notice to perform covenant in lease against subletting need not be served on one guilty of breach thereof, as law does not require vain act.

5. Action ⇨24

Defendant in action to declare forfeiture for alleged default in condition of contract may plead equitable defense, though action is summary in principle and process.

6. Landlord and tenant ⇨104

Equity ordinarily can give no relief against forfeiture of lease for breach of covenant not to sublet.

7. Equity ⇨24

The word "willful," in statute providing that party may be relieved from forfeiture for noncompliance with contract on making full compensation to other party, except in case of grossly negligent, willful, or fraudulent breach of duty, must be understood in ordinary sense of "spontaneous" or "voluntary." Civ.Code, § 3275.

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

8. Landlord and tenant ⇨104

A sublessee's voluntary and intentional subletting of leased land by carefully drawn written instrument in violation of covenant, binding on him, in basic lease, was "willful" within statute barring relief from forfeiture for noncompliance with contract provisions in case of willful breach of duty. Civ.Code § 3275.

9. Landlord and tenant ⇨104

The general rule that equity will not enforce forfeiture is inapplicable in action to quiet title to land sublet in violation of covenant in lease. Code Civ.Proc. § 738.

10. Landlord and tenant ⇨104

The trial court could not refuse to forfeit lease for willful breach of covenant against subletting by sublessee on ground that such breach was not such substantial departure from requirements of basic lease as to call for such drastic action. Civ.Code, § 3275.

11. Landlord and tenant ⇨104

Evidence that defendant, in action to quiet title to leased land and eject sublessee therefrom for his breach of covenant against subletting in basic lease, continued to act as manager of leased premises after subletting them to another, was inadmissible.

12. Landlord and tenant ⇨104

Evidence, in action of ejectment against city, to which plaintiffs' grantors leased land, and one to whom city sublet it as authorized by lease, that it was inequitable from standpoint of public interest to declare basic lease forfeited for such sublessee's breach of covenant against subletting, was inadmissible, where city did not appeal from judgment of forfeiture.

13. Appeal and error ⇨1071(5)

The trial court's irrelevant findings against defendant on question as to which evidence offered by him was properly rejected were harmless to him.

14. Landlord and tenant ⇨104

The trial court properly awarded lessor's grantees money judgment against sublessee continuing to occupy leased premises after forfeiture of basic lease for his violation of covenant against subletting therein and declining to vacate them after due notice.

Appeal from Superior Court, Riverside County; V. N. Thompson, Judge.

Action by Oscar Crowell and wife against the City of Riverside, Roman Warren, and another to quiet title to land and in ejectment. Judgment for plaintiffs, and defendant Warren appeals.

Affirmed.

A. Heber Winder, of Riverside, for appellant.

Sarau & Thompson, of Riverside, for plaintiffs respondents.

Eugene Best, City Atty., of Riverside, for respondent City of Riverside.

James B. Ogg, of Alhambra, for respondent Kenneth R. Brooks.

HAINES, Justice pro tem.

On January 2, 1934, W. C. Evans and wife, and Citizens National Trust and Savings Bank, a corporation, executed to the City of Riverside, a municipal corporation, a lease for a term of five years, of about 80 acres of land owned by the lessors in Riverside county, at a rental of \$1 a year. The lease provided that "said property will and may be used only for the purpose of maintaining and providing an airport and facilities for the accommodation of, manufacture, sale, and renting of aircraft and other appurtenances and accessories". It was also stipulated that the buildings and improvements thereon "do not belong to the lessors and are not included in the lease." The lessee, while not in default, was given the optional right to purchase the land for \$37,500. The lease contained a clause to the effect that:

"It is further understood and agreed that no sublease will be made of this property by lessee to anyone without written consent thereto by lessors, it being a consideration of this lease that a sublease is being made to Roman C. Warren."

It also provided that if the lessee should default in any of the covenants to be performed on its part lessors might, at their option, in the event the default did not end within thirty days after written notice thereof, reenter, take possession of the premises and remove all persons therefrom. The lessee agreed, at the expiration of the term, or any sooner termination of the lease, to quit and surrender the premises to the lessors.

On the same day, January 2, 1934, the City of Riverside, on its part, executed a lease of the property to defendant and appellant, Roman Warren, for the same term and containing a like option to purchase the property for \$37,500 while such lease should be in good standing. This lease contained an agreement in the same terms as the other respecting the use of the premises only for maintaining and providing airport facilities. It omitted, however, any covenant against subletting.

On March 12, 1936, without seeking or obtaining the consent either of the lessors in the basic or original lease, or of his immediate lessor, City of Riverside, Warren executed what was in form a lease of the

property and of an airplane hangar thereon to one Kenneth R. Brooks for a period of one year beginning April 1, 1936, Brooks covenanting to maintain it as an aviation field, and it being stipulated that "said field shall be under the management of said party of the first part", that is Warren. Brooks, however, was to be allowed the exclusive use of the hangar.

On April 13, 1936, W. C. Evans and wife and the bank conveyed the southerly portion of said 80 acres, amounting to about 40 acres, or half of the whole, to the plaintiffs Oscar Crowell and Nellie B. Crowell. The Crowells, claiming that the basic or original lease executed to the City of Riverside by their grantors had been forfeited by Warren's sublease to Brooks, after having on May 21, 1936, in conjunction with the Evans and the bank, served the city with a notice of termination of the lease made to it, and after having, on June 1, 1936, served on appellant Warren a notice demanding possession of the property, on September 12, 1936, brought the present action in two counts, the first to quiet title to the said 40 acres and the second in ejectment against the City of Riverside, appellant Warren, and the said Brooks, as defendants, and obtained in the trial court judgment determining the forfeiture of the lease, awarding them possession of the property, and, as against appellant Warren, awarding them, in addition, \$350 by way of damages for its detention. From this judgment defendant Warren alone has taken the present appeal.

Appellant's position is: (a) That the covenant against subletting appearing in the basic or original lease from the Evans and the bank to the City of Riverside was single and not continuing; that the city having, with permission of its lessors and by arrangement with them, coincidentally executed the sublease to appellant Warren without any inhibition against subletting, he was under no such inhibition, and the subletting by him was no breach of the basic lease; (b) that the arrangement between appellant Warren and Brooks, though described as a lease, was in reality more in the nature either of a license or a servitude upon Warren's leasehold rights, so that even if Warren were affected by the inhibition against subletting contained in the basic or original lease, he did not in fact breach it; (c) that whether the basic lease was technically breached or not, the case was not a proper one in which to declare a forfeiture; (d)

that the trial court committed reversible error in excluding evidence that Warren continued, after making his agreement with Brooks, to act as manager of the premises; and (e) that the trial court committed reversible error in excluding evidence of such public interest in the enterprise as made it inequitable to declare any forfeiture.

The discussion in the briefs over the effect of the permission given by the lessors to the City of Riverside to sublet to Warren and the execution by the city to Warren of the sublease referred to has taken a wide range. Attention has been called to the rule laid down in England in what is known as *Dumpor's case*, 4 Coke 119b (76 Eng. Reprint, 1110). This rule is epitomized in *Kendis v. Cohn*, 90 Cal.App. 41, 52, 265 P. 844, 848, where it is stated to be:

"That a condition against assignment without the license of the lessor *is entire and cannot be apportioned* by the act of the parties; and that a license given and an assignment made pursuant thereto destroys the whole condition, leaving the assignee or any subsequent assignee at full liberty to assign the lease to whomever they please."

The rule is otherwise stated in *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W.Va. 291, 301, 302, 112 S.E. 512, 516, referring to *Reid v. Wiessner Brewing Co.*, 88 Md. 234, 40 A. 877, as follows:

"When there is a condition in a lease against the assignment of the term without the consent of the lessor, and such consent is given to one assignment without any restriction as to future assignments, the condition is waived altogether and the assignee may assign the term without the consent of the lessor."

The history of this doctrine, as enunciated in *Dumpor's Case*, with its subsequent fortunes in various jurisdictions, has been traced in *Kendis v. Cohn*, *supra*, pages 51-53, 265 P. 844, and more elaborately in the Wyoming case of *Investors' Guaranty Corporation v. Thomson*, 31 Wyo. 264, 225 P. 590, 32 A.L.R. 1071, and it would serve no useful purpose to here enlarge upon what has in these cases been said about its lineage or vitality. It was, however, in *Kendis v. Cohn*, *supra*, said:

"It has long been settled that restraints upon the use or alienation of granted premises may within certain limits be lawfully imposed, which is a reasonable recognition of the owner's rights to deal with property as he pleases, provided the

restraints are not unlawful or against public policy. *Broadway Bank v. Adams*, 133 Mass. 170, 43 Am.Rep. 504; *Nichols v. Eaton*, 91 U.S. 716, 23 L.Ed. 254 [see, also, *Rose's U.S. Notes*]. Consequently, covenants against assignment of a lease without the written consent of the lessor are regarded as fair and reasonable. The lessor may place any restriction within these limits on the right of the lessee to select his tenant for him. *E. H. Powers Shoe Co. v. Odd Fellows Hall Co.*, 133 Mo.App. 229, 113 S.W. 253. The rule in *Dumpor's Case* contravenes these rules of law, and denies the lessor the right to select his own lessee and protect his reversionary estate. The rule in *Dumpor's Case* has virtually been overturned by another doctrine established in regard to conditions. This is the doctrine of continuous conditions, which has long been applied both in this country and in England."

As applied to assignments of leases, we understand this doctrine of single or continuous conditions to mean substantially this: that where a lease contains a covenant by the lessee not to assign without the lessor's permission and provides that a violation thereof shall entail a forfeiture, but such covenant is not, in terms, stated to be binding on the lessee's assigns, or on the lessee's heirs, successors and assigns, there the covenant is said to be *single*, that is, to inhibit no assignment other than one by the lessee. In such a case, therefore, if the lessee obtains permission to assign, and does so, his assignee is under no inhibition to make further assignments because the original lease only inhibits the original lessee from assigning and does not by its terms inhibit his assignee from doing so. *Chipman v. Emeric*, 5 Cal. 49, 63 Am.Dec. 80; *German-American Sav. Bank v. Gollmer*, 155 Cal. 683, 102 P. 932, 24 L.R.A., N.S., 1066. Since a single assignment divests the lessee of any interest susceptible of being assigned, the inhibition personal to him against assigning, said to be single, has exhausted its force. On the other hand, when, by the terms of the original lease, the covenant not to assign without the lessor's consent is expressed as binding the lessee *and his assigns*, or the lessee, *his heirs, successors and assigns*, and the lease provides for a forfeiture in the event the covenant is broken, there an assignment by the lessee, pursuant to permission obtained from the lessor, does

not free the assignee from the binding force of the condition, for, although the assignee is without privity of contract with the lessor, he does yet deraign title to the leasehold through the original lease and is, therefore, in privity of estate with the lessor (15 Cal.Jur., pp. 753, 754, and cases cited), and by the terms of the original lease the assigns or heirs, successors and assigns, as the case may be, of the original lessor, are, on pain of forfeiture, expressly forbidden to assign. In these circumstances the inhibition against assignment is said to be continuous and to run with the land, and therefore not to be vitiated by permission to the lessee to make any particular assignment except as to that assignment only. *Easley Coal Co. v. Brush Creek Coal Co.*, supra, citing *Williams v. Earle*, L.R. 3 Q.B. 739; *Roe v. Harrison*, 2 T.R. 425; *Jackson v. Groat*, 7 Cow., N.Y., 285; 16 R.C.L., p. 838, and 18 Am. & Eng. Ency. of Law, 662; see, also, *Kendis v. Cohn*, supra.

The pervading distinction adverted to between single and continuous conditions, while implicit in the earlier California cases, seems first to have been given emphasis in this state in *Kendis v. Cohn*, supra. An application in that case for a hearing in the Supreme Court was denied.

The instant case, however, is not one of an assignment of any lease. It is one of a sublease by the City of Riverside to Warren, and the further sublease by Warren to Brooks.

There has been a pretty general understanding, even where *Dumpor's Case* has been recognized as law, that its doctrine is inapplicable to subleases and it was said in *Kendis v. Cohn*, supra, page 54, 265 P. page 849 that:

"It is well settled that the waiver of a condition as to one subletting does not discharge the condition. *Goodwin v. Grosse*, 56 Cal.App. 615, 206 P. 138; *Miller v. Newton-Humphreville Co.* (N.J.Ch.) 116 A. 325; *Doe v. Bliss*, 4 Taunt. 735; *Farr v. Kenyon*, 20 R.I. 376, 39 A. 241; *Seaver v. Coburn*, 10 Cush. (Mass.) 324; *Harmon v. Dickerson* (Mo.App.) 184 S.W. 139."

We do not understand that counsel for appellant disputes the propositions just enunciated, insofar as they have to do with the assignment of leases, but he does dispute the proposition that a covenant may not also be single as respects the agree-

ment not to sublet. We agree with him that the circumstance that the sublessee is charged by the law with notice of the terms of the basic lease (*Baranov v. Scudder*, 177 Cal. 458, 170 P. 1122; *Pedro v. Potter*, 197 Cal. 751, 242 P. 926, 42 A.L.R. 1165; *Coalinga, etc., Co. v. Associated Oil Co.*, 16 Cal.App. 361, 116 P. 1107, and *Georgious v. Lewis*, 20 Cal.App. 255, 128 P. 768) is no aid in that inquiry, for the fundamental question is not what the sublessee is charged with knowing about the terms of that lease, but, rather, what those terms, under the law, mean. Counsel's position, however, is that in respect to covenants against subletting, equally with covenants against assignments, the covenant may be either single or otherwise, according as it is so written as to be personal to the lessee; or, contrariwise, is stated to be on behalf of himself "his heirs, successors and assigns" or there is contained in it some expression to that effect. So far as the California precedents are concerned, his reliance appears to be on what he conceives to be the reasoning in *Miller v. Reidy*, 85 Cal.App. 757, 260 P. 358, and of *Kendis v. Cohn*, supra, both of which, according to his contention, substantially argue that, so far as the difference between covenants that are single and covenants that are not is concerned, subleases and assignments stand on the same basis. With respect to this contention it is first to be observed that *Miller v. Reidy*, supra, was purely an assignment case and involved no question of sublease, and could, therefore, be no authority for or against any such proposition as counsel asserts as applying to subleases. *Miller v. Reidy* does not in any way mention the subject of subletting otherwise than (top of page 760, 260 P. 358) to refer to a notice given by the lessors as complaining of "subletting", while the context shows what they really complained of was an assignment. In *Kendis v. Cohn*, on the other hand, the facts were that the original lessors, the Cohns, executed to the lessees, the Barkers, a lease wherein the lessees covenanted not to assign or sublet without the consent of the lessors. The lease included the following clause:

"This lease and all its covenants, agreements, and conditions shall bind said lessors, their heirs, executors, administrators, and assigns, and shall bind said lessees, their heirs, executors, administrators, and successors, and also their

assigns, in case of an assignment of said lease by and with the written consent of the lessors."

The Cohns and the Barkers coincidentally executed a separate writing whereby the former agreed to accept Mrs. Kendis as "sublessee" of the Barkers, provided that she should observe all of the covenants of the original lease on pain of forfeiture of her rights. At substantially the same time, the original lessees, the Barkers, and Mrs. Kendis, entered into a mutual agreement consisting of a third document, variously interpreted as an assignment or a sublease from the Barkers to Mrs. Kendis, by the terms of which she expressly agreed to observe the terms of the original lease from the Cohns which was referred to and by reference made a part of this document. By a fourth document, to which the Cohns were not parties, and of which, so far as appears, they knew nothing until later, the Barkers undertook to permit Mrs. Kendis to assign her rights without obtaining anyone's consent. Subsequently, the Barkers released all their interests under the original lease to the original lessors, the Cohns. Thereafter, Mrs. Kendis sought to assign her rights to one Roberts, and the litigation before the court involved her claim of right to do so. While the parties had described the document under which Mrs. Kendis held as a sublease, the trial court considered it to be an assignment from the Barkers. The appellate court, though recognizing some difficulty in determining which it was, and referring to it in some portions of its opinion as an assignment, thought on the whole that it amounted to a sublease. Page 59, 265 P. 844. The court went on to say, however, that, in the circumstances, the condition against subletting being a continuous covenant, its waiver as to one subletting did not discharge the condition, and said further:

"It follows, therefore, whether the instrument in question be an assignment or a sublease, the same result obtains, and, while respondent has the right to quiet and undisturbed possession of the premises under the terms of the lease upon complying with its terms, she would not be licensed to assign or sublet without the consent of appellants."

We are unable to see that this case can afford any real authority either for or against appellant's contention that there may be such a thing as a covenant against subletting which is not continuous. The

court had no actual occasion to decide any such question, since Mrs. Kendis had agreed to abide by the original lease.

In *Goodwin v. Grosse*, 56 Cal.App. 615, 206 P. 138, a lessee under a lease which contained a covenant that, so far as is stated in the opinion, appears to have been personal to him, forbidding subletting without the lessor's consent, on pain of forfeiture, had sublet part of the leased premises, as he claimed, by permission of the lessor's agent. Since the trial court had found, as a fact, that no such permission had actually been given, the appellate court was not really required to decide whether, if it had been given, it would have done away with the inhibition against making a second sublease or not, and therefore the case can hardly be said to be authority one way or the other on that subject. Nevertheless, it was said in substance that even though he were given such permission to make one sublease, that would not destroy the continuing effect of the covenant and condition, to forbid the making of another.

[1] For our present purposes, however, we do not believe it necessary to decide whether the distinction ordinarily assumed to exist in leases between covenants and conditions not to assign and covenants and conditions not to sublet, as respects their running with the land, ought finally and definitively to be held to be law in this state or not, for in the instant case there exist circumstances that, independently of what may be held to be the general rule, characterize the particular covenant against subletting here involved, as upon its face, intended to apply as a condition to appellant Warren. One of these circumstances is that the covenant not to sublet is, as has been seen, made not only in the same document, but as a part of the identical sentence in which it is stated that it is "a consideration of this lease that a sublease is being made to Roman C. Warren". Manifestly, the covenant and condition against subletting was either entirely nugatory, which cannot be assumed to have been the intention, or else it was intended to inhibit some other subletting than the subletting to Warren. The scope of the sublease to Warren is not, in the language quoted, limited in any way, and it is a sublease not permitted, merely, but required, by the language used. The inference is that it was intended in content and duration to be coextensive with the original or basic lease, as in fact it

turned out to be, in so far as its term, the property leased, and the rent reserved were concerned. Another circumstance is that the purposes of the basic lease very definitely appears from its terms to have been to provide for an airport, and this, coupled with the requirement, just adverted to, that a sublease be executed to Warren, strongly indicates that what the lessors had in view was an airport to be operated by Warren. In these circumstances it is tolerably plain from a mere inspection of the basic lease, that the intention was to employ the city as an instrumentality, largely nominal, for installing Warren as the real lessee. Why the city's intervention should have been desired at all does not, of course, appear on the face of the documents, though it is claimed that in fact what was wanted was government aid for the airport which could only be had if the city allowed its name to be used. However that may have been, the obvious intent of respondents' grantors that Warren should conduct the airport was served by the action of the city in immediately and, in fact, coincidentally and as part of the same transaction, making the sublease to him. What subletting, then, is it reasonable to believe that the original or basic lease was intended to forbid, unless done with the written consent of the original lessors? The language used indeed is "no sublease * * * by lessee * * *." This might conceivably have been intended merely to apply in the contingency that Warren should throw up his sublease and occasion should arise for the city to substitute another sublessee in his place. But even if we take the situation only as disclosed on the face of the basic lease, without reference to anything extrinsic to that, it still seems to us more natural to believe that the expression "lessee", in the covenant against subletting thus appearing, was in this instance intended to include Warren, as the intended occupant and real tenant, as well as the city. Treating it as carrying that meaning, and having in mind that, as already noticed, Warren is charged by the law with notice of its terms, we have no hesitation in holding that, whether or not an inhibition against subletting, when made a condition, can generally be said to run with the land, that for practical purposes was the effect of this one, so far as he was concerned. It must, then, be considered and held that, in this case, Warren was required, on pain of forfeiture, to refrain from subletting.

[2, 3] We are thus brought to the next of appellant's principal contentions, namely, that his arrangement with Brooks was not in fact a sublease. The instrument involved is in evidence. It purports to be a lease for one year with certain privileges of extension, of "the right to use for commercial flying and aircraft services subject to all conditions hereinafter set forth" the 80 acres or thereabouts already referred to, which it proceeds to describe; "together with the airplane hangar thereon located". It reserves the rental to be paid by Brooks to Warren in monthly instalments. It contains a covenant on Brooks' part not to underlet or assign the lease. It contains, *inter alia*, further clauses as follows:

"It is further agreed that the aviation field located upon said real property shall, at all times, remain open to all aviators, including the party of the first part, as a public airport and without pay or rent, subject to the rules and regulations of the United States Department of Commerce and second party hereby agrees to observe said rules and regulations as well as all statutes, rules and regulations of all public agencies and of all branches of federal, state and county government. Said field shall be under the management of said party of the first part. Any such aviator may make temporary repairs to any ship upon said field without rent or pay for use of said field.

"It is further agreed that said second party assumes each and every liability for damages arising from the said use of said field, save those caused by negligence of first party, and second party agrees to save first party harmless from such damages.

"It is further agreed that second party shall have the full and exclusive use of said hangar."

We are not able to agree that this instrument amounts merely to a license or, at the most, to some sort of a servitude on the premises involved, though it may have some of the characteristics of both. Undoubtedly the retention by Warren of the right to manage the aviation field is a somewhat anomalous feature in a lease and curiously inconsistent with Brooks' assumption of liability for all damages arising from the use of the land as such aviation field other than such as might be caused by negligence on Warren's part. Exactly what Warren's rights and duties as manager were to be is not defined, neither does it very clearly appear how much personal activity on Brooks' part is implied in the right given to Brooks

to "use" the property for "commercial flying and an aircraft service", but it must, we take it, be considered that the terms of the instrument, though it contemplated that the airport should be open to aviators generally "without pay or rent", subject to government regulation, yet entitled him to collect and retain for his own use and benefit, subject only to the obligation to keep up his rent payments to Warren, all charges which might, under the terms of the instrument, be made for any services to be rendered to aviators or others using the field. Moreover, despite counsel's suggestions to the contrary, it is as much a subletting to sublease part of a property as the whole (see e. g. *Goodwin v. Grosse*, *supra*); and Brooks was given the exclusive right of occupancy of the hangar, which necessarily involved the ground on which the hangar was located. Certainly as to that it cannot be argued even with plausibility that the arrangement was not a sublease. Taking the instrument as a whole, we think its dominant character to be that of a sublease, notwithstanding the reservation, whatever that may have amounted to, of Warren's right of management. The instrument is at least too broad in its terms to amount merely to a license, nor do we think it was a mere easement. For that matter, however, even if all that were sublet were an easement in gross, it might be a question whether its creation would not be to that extent a forbidden subletting. An easement may be a freehold or a chattel real, according to its duration (*In re Appeal of North Beach & M. R. R. Co.*, 32 Cal. 499, 506); and is in either case an interest in real property. *Corea v. Higuera*, 153 Cal. 451, 454, 455, 95 P. 882, 17 L.R.A., N.S., 1018.

[4] It is settled that where the breach of a condition consists of subletting, no notice requiring the performance of the covenant need be served since it is impossible for the one guilty of the breach not to do that which he has already done. *Harloe v. Lambie*, 132 Cal. 133, 135, 64 P. 88. The law does not require a vain act.

The next question is whether, even though it be conceded that the making of the sublease to Brooks was a breach of a condition in the original lease from the plaintiffs' grantors to the City of Riverside, the breach was of such a nature as to compel the enforcement of a forfeiture.

[5] "In an action to declare a forfeiture because of an alleged default in a condition of a contract, the defendant may

plead an equitable defense, seeking relief against the forfeiture, and this although the action brought is summary in principle and process. The very nature of the action involving, as it does, a forfeiture, is said to appeal to the equity side of the court and in turn requires a full examination of all the equities involved to the end that exact justice be done." 12 Cal.Jur. 641, citing Gray v. Maier & Zobelein Brewery, 2 Cal.App. 653, 84 P. 280, and Knight v. Black, 19 Cal. App. 518, 126 P. 512.

In the last-mentioned case it was said (page 524, 126 P. page 515):

"The trial court granted plaintiff's motion to strike out the essential parts of the quoted portion of the defendant's answer upon the theory, apparently, that a literal compliance with the condition of the lease, notwithstanding that its breach involved a forfeiture, was absolutely essential to the life of the lease and the estate granted thereunder, and that a substantial compliance with the condition could not be pleaded or considered as a valid defense to the action.

"This, we think, was error, which subsequently and necessarily resulted in prejudice to the defendant by the exclusion of proffered testimony which would have been material and relevant to the issue presented by this defense."

[6] An examination, however, of the authorities having to do with the subject of relief in equity against forfeitures discloses a very well-defined line of demarcation between those forfeitures against which equity will afford relief and those in which it refuses to do so. It is said in 1 McAdam on Landlord and Tenant (pp. 846-847): "Equity lies at the foundation of relief in the case of forfeiture, and good conscience is the beacon light that points the way out. Compensation is the panacea. * * *

"Equity will as a rule relieve against a forfeiture, where the breach is not willful, and where compensation can be made, or where the forfeiture is a mere security.
* * *

"A court of equity may relieve a tenant from a forfeiture of the lease if the forfeiture was through inadvertence, accident or mistake, on such terms as may be just, but not where there is willful, voluntary, gross, or inexcusable neglect."

In the same volume the author says (p. 848):

"Relief is generally confined to cases of covenant for the payment of money where

the amount can be unquestionably fixed, and not to covenants to keep insured, and the like."

Also that:

"Forfeitures for breach of covenant not intended merely as security for the payment of money will not generally be relieved against, for the reason that no exact compensation can be made."

Also that:

"Among these covenants for a breach of which no relief can ordinarily be given is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specified time; the covenant to insure; the covenant not to assign without license; and in other covenants of a special nature."

Manifestly a covenant not to sublet falls into this class.

[7, 8] In this state section 3275 of the Civil Code provides:

"Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

"Willful", as the word is used in this code section, is to be understood in its ordinary sense of "spontaneous" or "voluntary". Parsons v. Smilie, 97 Cal. 647, 654, 655, 32 P. 702. The breach in the instant case of the inhibition against subletting, which, as we have held, amounted to a condition by which appellant Warren was bound, was not one susceptible of being compensated in money. Indeed, since Warren had not covenanted that he would not sublet, no cause of action could be stated against him for any compensation to respondent for any damages, if such there were, sustained by the latter by reason of such subletting. Moreover, the subletting was voluntary, intentional, and so deliberate as to be evidenced by a carefully drawn written instrument. In these circumstances it would be impossible to treat it as otherwise than "willful". Obviously, then, the breach of condition is not one against which equity can relieve, but is rather of the class excepted by section 3275, supra, from those from which relief is permissible.

[9] It has even been said that equity will not enforce a forfeiture even though the case be one in which no equitable relief against the forfeiture would be granted. *Harrison v. Woodward*, 11 Cal.App. 15, 22, 23, 103 P. 933. While, however, as already observed, the complaint in the instant case seeks, in one of its counts, to quiet the respondents' title and is, therefore, as to that count, in some sort a bill in equity, yet it is such only in a limited sense, since actions to quiet title are authorized by section 738 of the Code of Civil Procedure and governed by its provisions. In an action to quiet title, therefore, where the case involves a purported forfeiture, what the court is in reality asked to do is not to alter the existing status but to declare it. If the forfeiture has occurred, it has already taken place without any action on the court's part. The court's duty is merely to determine the fact. That is a duty which, in the light of section 738, *supra*, may not be declined. The general rule that equity will not enforce a forfeiture does not apply.

[10] It may perhaps be urged that, even though the inhibition against subletting be held, as we have held it, to be a condition binding as such upon Warren, and one of a class against which equity may not generally relieve, yet in this instance the breach was not a substantial one. Although his contention is not made in precisely that language, appellant's counsel does direct our attention to *McNeece v. Wood*, 204 Cal. 280, 267 P. 877, in which it was, *inter alia*, said (page 284, 267 P. page 879) that: "the equities of the case do not call for the drastic remedy of forfeiture under the facts presented", and he seeks generally to show in the instant case that the making of the sublease to Brooks was in aid of the purposes for which the original lease was granted, or that by reason of Warren's retention of the right to supervise the conduct of the aviation field, the making of the sublease was not of sufficient importance as a departure from what the basic lease required as to call for such drastic action as that which respondent has here sought and, in the trial court, obtained. *McNeece v. Wood*, however, is essentially distinguishable in its facts. There what was relied on as the ground of forfeiture consisted of two violations of a requirement in the lease that the lessee permit no unlawful acts on the leased premises. It was shown that two such acts had occurred without the tenant's knowledge, though

he was held to have taken every precaution against their occurrence. In the instant case, however, on the contrary, as already observed, the breach complained of was definitely a willful act on appellant's part within the meaning of the term "willful" as used in section 3275 of the Civil Code. In these circumstances we do not think it would have been competent for the trial court to undertake to measure the degree of departure which the making of the sublease to Brooks tended to bring about or did bring about from the plan for the operation of the aviation field which the basic lease contemplated. It is enough that the original lessors, for reasons satisfactory to themselves, stipulated in effect that nobody, other than Warren, purporting to hold any sublease of the property, should have anything to do with it as a lessee. Whether some arrangement other and different from that ought to have been satisfactory to the Evans, to the bank, or to respondents as their grantees, is a matter which they must decide. The courts are not authorized to substitute their judgment on the subject.

[11-13] We think that what we have said necessarily disposes of the other contention on behalf of appellant Warren that the trial court erred in rejecting his offer to prove that he, after his arrangement with Brooks, continued to act as manager of the premises, and we furthermore think that, so far as Warren was concerned, there was no error committed in rejecting his offer to prove that it is inequitable from the standpoint of the public interest to declare the basic lease forfeited. The circumstance that defendants set up in their answers what they claim the facts to have been in these particulars makes no difference. Irrelevant matter, though pleaded, is still irrelevant. So far as public interest is concerned, the City of Riverside appears to be the only authorized representative of such interest made a party to the action and it has not appealed from the judgment. We do not think that phase of the case one which appellant Warren was or is entitled to litigate. It is probably true that having rejected the evidence which appellant proffered on this latter subject, the trial court ought not to have gone on and made findings upon it adverse to appellant's allegations, or to have made any findings with respect to the public interest at all. In so far as appellant is concerned, these findings are as irrelevant to anything requiring decision as are the issues which he tendered

on the subject. Being irrelevant, however, such findings can have done no harm.

[14] There is nothing in the claim that the court was not authorized to award the \$350 money judgment against Warren. Regardless of what his status was, he continued, after the basic lease had been forfeited, to be at least one of the occupants of the premises and declined to vacate them after due notice requiring him to do so.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 584

DE FREECE et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
Civ. 10655.

District Court of Appeal, First District
Division 1, California.

May 26, 1938.

Hearing Denied by Supreme Court
July 25, 1938.

1. Divorce Ⓒ163

Under statute providing that a final divorce decree nunc pro tunc may be granted when by mistake, negligence, or inadvertence a final decree has not been signed, filed, or entered, a final divorce decree could not be amended two years after it was signed, filed, and entered to restore divorced wife to the status of a single person. Civ. Code, § 133, as added by St.1935, p. 1459.

2. Workmen's compensation Ⓒ1713

Whether woman claiming compensation on ground that she was a member in good faith of family and household of deceased employee believed in good faith that her common-law marriage to deceased employee was legal was a question of fact for the Industrial Accident Commission. St.1917, p. 844, § 14(c).

3. Workmen's compensation Ⓒ1474

Evidence warranted Industrial Accident Commission's denial of compensation to woman who lived with deceased employee as his wife for more than six years and who

asserted that she was a member in good faith of his household on ground that she did not in good faith believe that her common-law marriage to deceased employee was legal. St.1917, p. 844, § 14(c).

4. Workmen's compensation Ⓒ456

A son and daughter of woman living with deceased employee as his wife for more than six years prior to his death were not entitled to compensation, where the woman's common-law marriage to employee was illegal and son and daughter were not members in good faith of employee's household or dependent on him for support, but lived with and were maintained by other relatives. St.1917, p. 844, § 14(c).

Certiorari proceeding by Bessie De Freece and others against the Industrial Accident Commission of the State of California and the State Compensation Insurance Fund to annul the decision of the Industrial Accident Commission denying the application of Bessie DeFreece and others for compensation for the death of Clark DeFreece.

Decision affirmed.

Alfred C. Skaife and A. L. Crawford, both of San Francisco, for petitioners.

E. A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

PER CURIAM.

Clark DeFreece died January 20, 1935, as the result of injuries received in December, 1933, while in the employ of a laundry company. The insurance carrier furnished all necessary medical aid and paid him compensation from the date of the injury until his death, at which time an additional sum was paid for funeral expenses. Thereafter the petitioners herein filed with the Industrial Accident Commission their joint application for compensation on account of his death, and after a hearing on the merits the application was denied. Petitioners then instituted this proceeding in certiorari for the purpose of having the commission's decision reviewed and annulled.

The application filed with the commission was based upon the ground that at the time the decedent was injured and at the time of his death, petitioners were members in good faith of his family and household, and therefore were entitled to compensation under the provisions of subdivision (c), section 14, of the Workmen's

Compensation Act, St.1917, p. 844. The commission found against them, however, on that issue, and the determinative question here presented is whether, as petitioners contend, said finding is wholly unsupported by the evidence.

[1] There is little dispute as to the facts, the controversy having arisen mainly over the conclusions drawn from those facts. It appears therefrom that Bessie DeFreece (who will be hereinafter referred to as petitioner) formerly lived in the state of Washington. She was married to one Marion J. Lennox; and Donald and Theda Lennox (the other two petitioners) aged respectively twenty and eighteen years at the time of DeFreece's death, were the issue of the Lennox marriage. In 1918 petitioner separated from Lennox in Washington, and in 1922 moved with her children to the home of her parents in San Jose, California, where on May 6, 1927, she obtained an interlocutory decree of divorce from Lennox. She had known DeFreece in Washington, and a few months subsequent to her arrival in San Jose he moved to that city. Contemplating marriage, they purchased a home in San Jose in their joint names, and early in September, 1928, which was more than one year after the entry of the interlocutory decree of divorce, and believing, so she claimed, that the final decree had been entered, they went to Reno, Nevada, to be married. They arrived there on the Sunday before Labor Day, and petitioner claimed that they were informed that the marriage license office was closed, and that a license to marry could not be obtained until Tuesday morning. She further claimed that DeFreece was obliged to be back at work in California on Tuesday morning, so they entered into an oral common-law marriage contract (which contracts were recognized as valid in the state of Nevada), went to an auto camp in Reno Sunday night, and registered and cohabited as husband and wife. The next day they returned to San Jose, announced to their relatives and friends that they had been married, and thereafter lived together as husband and wife until the death of DeFreece. Some of the time petitioner's children lived with them. During such relationship they filed a homestead on their home, and acquired other property in their joint names, as husband and wife. In the meantime and shortly after DeFreece was injured they went to Oregon, one of the

purposes of the trip being to have a marriage ceremony performed, but they abandoned the idea upon learning that in that state one of the prerequisites to marriage was the obtaining and presentation of a health certificate, which they feared DeFreece, on account of his injured condition, would be unable to secure, so they returned to San Jose, and as stated, lived together as husband and wife until DeFreece died. Immediately following DeFreece's death, petitioner consulted an attorney in San Jose with the view to filing an application for compensation, and she learned for the first time, so she claimed, that her final decree of divorce had never been granted and that her common-law marriage was illegal. She ascertained also that the attorney whom she had employed to obtain the divorce had since died, whereupon, through the services of another attorney and on January 25, 1935, a final decree of divorce was obtained and entered. More than two years later and on April 8, 1937, acting under the authority of a new code section (Civ.Code, sec. 133, as added by St.1935, p. 1459), which became effective approximately eight months after the date on which her final decree was entered, she obtained an amended final decree purporting to restore her to the status of a single person as of May 8, 1928; but obviously such was not the effect of the amended decree, because the section provides that a final decree *nunc pro tunc* may be granted when "by mistake, negligence or inadvertence" a final decree "*has not been signed, filed or entered*" (italics ours); and here admittedly the final decree had been signed, filed and entered two years before. In fact, from the beginning petitioner has conceded that since her marriage to Lennox was not dissolved until until after DeFreece's death, she was never the legal wife of DeFreece.

With respect to the law of the case, one of the most recent decisions dealing with the question here involved is *MacArthur v. Industrial Accident Commission*, 220 Cal. 142, 29 P.2d 846, wherein the leading earlier cases are reviewed, discussed and differentiated; and it is there held in effect that where a woman, living with an employee at the time of his death, but who is not legally married to him, seeks compensation on account of his death upon the theory that she was a member in good faith of his household, it is essential for her to prove not only that she was living

with him under the belief in good faith that she was legally married to him, but she must show also some basis in fact upon which she was entitled to found such belief; and that the question of whether her evidence meets such requirement is one of fact for the commission to determine. For example, the claim of the applicant was upheld in *Temescal Rock Co. v. Industrial Acc. Comm.*, 180 Cal. 637, 182 P. 447, 13 A.L.R. 683, wherein the evidence showed that the contracting parties were ignorant Mexicans who obtained a license to marry and thereafter cohabited as husband and wife under the belief that the license was sufficient to constitute in itself a valid marriage; also in *Louden v. Industrial Accident Comm.*, 105 Cal.App. 65, 286 P. 1045, wherein both parties belonged to Indian tribes, and the marriage was solemnized in the "Indian way", which was recognized and considered among the two tribes to which they belonged as binding and effective as marriages solemnized in the "white man's way"; and again in *Landsrath v. Industrial Accident Commission*, 77 Cal.App. 509, 247 P. 227, 229, wherein "the positive first-hand testimony of the petitioner was that a marriage ceremony had been performed", and the details thereof given; while in two other cases like the one before us, wherein it was the intention of the parties to contract purely "common law" marriages, and no claim was made of solemnization of any kind, the applications for compensation were disallowed. *MacArthur v. Industrial Acc. Comm.*, supra, and *Taylor v. Industrial Acc. Comm.*, 131 Cal.App. 468, 21 P.2d 619. In the former case the "common law" marriage was contracted in British Columbia; thereafter the claimant and the decedent lived together as husband and wife up to the time of his death, a period of about eleven years; and the applicant testified that at all times she believed that she was lawfully living with the deceased employee as his wife, and that they had contracted a valid "common law" marriage. And in the latter case the applicant testified that a few days after she began living with the decedent as his wife the matter of a marriage ceremony was discussed and the decedent said that they were just as good as married—"it is a state law"; that she believed him, and therefore lived with him as his wife up to the time of his death, a period of eighteen years.

In our opinion the present case is not even as strong in favor of petitioner as

were the two cases last mentioned in favor of those applicants, for the reason that in those cases the applicants not only explained the reasons for having entered into common-law marriages, but testified that at all times they believed they were legally married; whereas here petitioner offered no explanation why, if she believed she had been divorced, she resorted to a common-law marriage, more than to say "there are reasons for it"; and that she was at all times doubtful as to the validity of such marriage is quite obvious from the following portion of her own testimony: "And so after we got over there (to Reno) and couldn't get married, when we came back we just said we were and we never could go ahead and have it done after that around here because everyone would know it. So, when we went up in Oregon, he was sick, we tried to have it done there, but he had to have a health certificate and couldn't. Mr. Prothero (counsel for respondents): You just decided to live together as husband and wife. A. Yes, because everyone knew what we went for and we had to let it go that way. That is the whole reason of it." Furthermore, as additional evidence tending to support the inference drawn by the commission that petitioner did not believe in good faith she was legally married is the circumstance of the trip to Oregon to have her marriage solemnized in the manner prescribed by law.

[2,3] In any event, under the rule the question of whether she did believe in good faith that her common-law marriage was legal was one of fact for the commission to decide, and in view of all the circumstances above set forth we are not prepared to hold that the conclusion it has drawn therefrom is unsupported.

[4] As to the claims of Donald and Theda Lennox, it will suffice to say that on account of the illegal marriage between their mother and DeFreece they did not bear unto DeFreece the relationship of stepson and stepdaughter; nor does the evidence disclose that either was a member in good faith of his household or dependent on him for support. Quite to the contrary, it appears that most of the time Donald Lennox lived with and was cared for by his grandmother, and that Theda Lennox lived with and was maintained by an aunt.

The decision of the commission is affirmed.

26 Cal.App.2d 595

PEOPLE v. COE.

Cr. 3098.

District Court of Appeal, Second District,
Division 1, California.

May 26, 1938.

I. Criminal law $\S$ 274, 1149

The granting or denying of permission to withdraw a plea of guilty and to substitute a plea of not guilty is within the sound discretion of the trial court, and its action must be upheld unless an abuse of discretion clearly appears.

2. Criminal law $\S$ 997

Defendant was not entitled to writ of coram nobis for leave to withdraw his plea of guilty after he had been sentenced thereon, where petition for writ set forth that plea of guilty was entered because defendant erroneously thought he never had been convicted of a felony and trial court gave slight if any credit to defendant's explanation for entering his plea, and there was no evidence in record either of an error of judgment or abuse of discretion.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Larry Coe pleaded guilty to a charge of grand theft and was sentenced. From a judgment denying a writ of coram nobis, defendant appeals.

Affirmed.

Richard A. Haley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant was charged in an information with the crime of grand theft. A plea of not guilty was entered, and the matter was set for trial on December 21, 1937. On that date defendant's counsel withdrew from the case and the public defender was appointed in his stead. The trial was reset for January 27, 1938, at which time defendant withdrew his plea of not guilty and entered a plea of guilty, orally applying for probation. Said application for probation was denied on February 15, 1938, and defendant was sentenced. Thereafter, on March 7, 1938, defendant filed a "Petition for a Writ of Coram Nobis", which in effect was merely a motion to vacate

the judgment and for leave to withdraw his plea of guilty for the purpose of entering a plea of not guilty. See *People v. Vernon*, 9 Cal.App.2d 138, 141, 49 P.2d 326. Said motion was supported by an affidavit executed by defendant, which in part read as follows: " * * * affiant pleaded guilty, solely and simply by reason of the fact that he was under the impression that he had not theretofore been convicted of a felony. That in the State of New York he had been convicted of the crime of forgery and granted probation and informed by the Court that if he lived up to the terms of his probation, he could come in at the end of his term of probation, ask that the Complaint theretofore filed, be dismissed and that thereafter he could truthfully say that he had never been convicted of a felony. That affiant lived up to the terms of his probation, that he made application for a dismissal, that said dismissal was granted and that affiant was informed, and that at all times believed that he had not been convicted of a felony. That had it not been for such belief affiant would not have entered a plea of guilty and had affiant been tried by a jury affiant would have been acquitted and found not guilty of the crimes charged in the above entitled case."

The motion was denied, from which order defendant appeals.

It appears from the record of the proceedings on the aforesaid motion that the defendant had denied, at all times, that he had ever been convicted of a felony,—not only to the probation officer but to his own counsel as well. The record of the hearing on the motion reveals the following:

"The Court: * * * Now, Mr. Haley, (defendant's counsel), for your own information, you have not stated the facts correctly to this court, namely, that this defendant denied to the probation officer at all times that he was ever convicted of any crime.

"Mr. Haley: He finally admitted it after they confronted him with the proof."

[1,2] The trial court evidently gave slight, if any, credit to the defendant's explanation. Primarily, the question raised by the motion was addressed to the judgment and discretion of the trial judge. The appeal presents no reason for disturbing the conclusion reached by the trial judge, there being no evidence in the record either of an error of judgment or an abuse of discretion. The Supreme Court, in commenting upon a somewhat similar situation,

declared that, "The granting or denying of permission to withdraw a plea of guilty, and to substitute a plea of not guilty, is a matter within the sound discretion of the trial court, and its action must be upheld unless an abuse of such discretion clearly appears. There are no such peculiar or unusual circumstances in this case as to enable us to say the trial court should have acted differently in the matter." *People v. Manriquez*, 188 Cal. 602, 607, 206 P. 63, 65, 20 A.L.R. 1441; see, also, *People v. Aseltine*, 139 Cal.App. 768, 770, 34 P.2d 830; *People v. Gottlieb*, Cal.App., 77 P.2d 489.

The order appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.



26 Cal.App.2d 660

In re KIRK'S ESTATE.

MacCONNON et al. v. SECURITY-FIRST
NAT. BANK OF LOS ANGELES.

Civ.S.C. 63.

District Court of Appeal, Second District,
Division 1, California.

June 2, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

Executors and administrators — 375

The trial court's conclusion, supported by law and evidence, as to necessity of executor's sale of realty belonging to estate and whether such sale was to latter's advantage and benefit, cannot be disturbed on appeal from order confirming sale. Probate Code, §§ 757, 785, and § 784 as amended by St.1935, p. 401.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Proceeding in the matter of the estate of Erminia G. Kirk, deceased. From an order confirming a sale of realty belonging to the estate by the Security First National Bank of Los Angeles, executor of deceased's will, Mary E. MacConnon and others, objectors, appeal.

Affirmed.

Schauer, Ryon & McMahon, of Santa Barbara, for appellants.

Heaney, Price, Postel & Parma, of Santa Barbara, for respondent.

DORAN, Justice.

The appeal herein is from an order confirming the sale of a certain parcel of real property located in the city of Glendale, California, constituting the chief asset of the estate of Erminia G. Kirk, deceased.

The property in question was appraised shortly after decedent's death, to wit, in June of 1934, at \$23,350; three other parcels of real property owned by the deceased were appraised at \$10,500, \$1,400 and \$12,600 respectively, making a total of \$47,850 in real property.

The debts of the estate consisted of a note in the sum of \$17,500 bearing interest at the rate of 7 per cent. per annum, secured by a trust deed held by the Security-First National Bank of Los Angeles upon said Glendale property; an unsecured claim in the amount of \$15,697.05 inclusive of interest, by one of the legatees; and an unsecured claim by a creditor of the estate in the amount of \$8,000, of which \$5,000 was advanced by her to carry the estate along after the death of the decedent.

The will of said deceased was admitted to probate and letters testamentary were issued to said Security-First National Bank of Los Angeles, as executor. One of the provisions contained in the will authorized and empowered the executor to "sell, lease or mortgage the whole or any portion of my estate, except as herein otherwise specifically devised, at either public or private sale, with or without notice, without securing any previous order of court therefor, and upon such terms and conditions as it may seem best, but subject, however, to confirmation by court as provided by law."

In May of 1936, after the Glendale property had been dormant for two years, the executor listed said property with a real estate agent. Some six months later an offer of \$25,000 was received from one Mr. McMullin. The executor consulted with the legatees, one of the creditors and the representative of the other creditor, and thereupon decided to reject the offer. The prospective purchaser then offered \$28,000; the executor again conferred with the persons interested, and at that time was advised that it was agreeable to sell. A higher bid was obtained thereafter from Mr. McMullin, namely, an offer of \$30,000 cash,

which the executor accepted, and an agreement of sale was entered into on December 10, 1936. The return of sale and a petition for confirmation of said sale was filed on December 11, 1936. Thereafter, the property was reappraised and a value of \$33,000 was fixed. Subsequently, the two unsecured creditors requested by letter to the executor that the sale of said property be declined.

Appellants herein (legatees under the will of decedent) filed objections to the confirmation of sale. After a full hearing upon the matter and an examination both by counsel and the court of the witnesses testifying at the hearing, the court made its order confirming the sale of the property in question.

In confirming the sale the court found, "That said sale was legally made and fairly conducted, and the said sum of \$30,000 is not disproportionate to the value of the property sold, and that said sum is equal to at least 90 per cent. of the appraised value thereof; that said property was appraised on the 15th day of December, 1936, and before confirmation of sale, for the sum of \$33,000; that a sum exceeding the sale price by at least 10 per cent., exclusive of the expenses of a new sale cannot be obtained for the property so sold; that said sale is for the advantage, benefit and best interests of said estate, and that good reason existed for said sale." It should be noted at this point that during the time in which the action was pending, and at the hearing which preceded the order confirming the sale, no other bid or offer was received.

Appellants contend that there was no necessity for the sale, nor good reason for it; that the sale is not to the advantage, benefit or best interests of the estate; and that the sum of \$30,000 representing the price offered for the property is disproportionate to its value.

Respondent maintains, however, that under section 757 of the Probate Code, an executor selling real property under the power contained in the will need not show the necessity of the sale, or that it is for the advantage or benefit of the estate or those interested therein; and, further, that under section 785 of the Probate Code, to justify a refusal to confirm such sale it must appear that the sum bid was disproportionate to the value of the property and

that a sum exceeding the bid by at least ten per cent. may be obtained, and such showing was not made.

Section 757 of the Probate Code provides as follows:

"Sales under direction of will. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell the same either at public auction or private sale, and with or without notice, as he may determine; but he must make a return of sales and obtain confirmation thereof as in other cases. In either case no title passes unless the sale is confirmed by the court; but the necessity of the sale, or its advantage or benefit to the estate or to those interested therein, need not be shown. If directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed."

Section 784 of the Probate Code, as amended by St.1935, p. 401, relating to the confirmation of sale, states that: "No sale of real property at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale. * * *"

Section 785 of said code, pertinent hereto, provides that if "* * * the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least ten per cent exclusive of the expenses of a new sale may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed * * *."

In support of the claim that the sale was unnecessary and not to the best interests of the estate, appellants contend, in substance, that if the sale were postponed for a sufficient length of time a higher price might be obtained for the property in question. It is pointed out in that connection that the property is in a more or less rapidly developing community and that therefore its increase in value is altogether likely. Respondent, on the other hand, submits that the likelihood of an increase in value is, at the most, problematical and that an executor is not permitted to speculate, for the benefit of the heirs, with the assets of the estate for which he acts.

It is unnecessary to determine the effect and application of section 757 of the Pro-

bate Code and its construction with relation to the other sections of the Probate Code above mentioned. The question as to the necessity of the sale, as well as the question as to whether the sale was to the advantage and benefit of the estate, was determined by the trial judge, as hereinbefore noted in the findings. The inquiry on the issues raised by appellants' objections was thorough, and the trial court's conclusions, which are supported by the law and the evidence, therefore cannot be disturbed on appeal.

There are no errors in the record.

For the foregoing reasons the order appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.



26 Cal.App.2d 597

GRANGE CO. v. McCABE et al.

Civ. 5903.

District Court of Appeal, Third District,
California.

May 26, 1938.

1. Sales ⇨199

A contract between seller and buyer of grain which stated that the seller "has sold" and the buyer "has bought" a certain quantity of sacks of grain and that payment was to be made when crop was delivered to warehouse, 60 per cent. of purchase price to be paid by July 1st, balance at time of shipment on destination weights, indicated that the parties considered the transaction as a sale, as respects question of passing of title.

2. Sales ⇨107

Where contract between seller and buyer of grain stated that payment was to be made when crop was delivered to warehouse, 60 per cent. of price to be paid by July 1st, balance at time of shipment on destination weights, seller was under duty to deliver grain and notify buyer of weight before payment could be demanded, as respected seller's right to rescind upon buyer's failure to make payment by July 1st,

and seller was required to indicate her intention to rescind by notice or some overt act. Civ.Code, § 1781.

3. Trover and conversion ⇨39

In action by buyer against seller for conversion of grain, where seller had attempted to rescind contract because of buyer's failure to tender 60 per cent. of purchase price by July 1st, according to contract, buyer mailed check to seller when informed that seller considered contract canceled, on July 14, and seller returned check on July 18, together with a letter stating that sale was canceled, court erred in admitting evidence of value of grain in August in view of statute that value of the property should be fixed as of time of the conversion. Civ.Code, § 3336.

4. Sales ⇨228

Where seller of grain had unsuccessfully attempted rescission of contract of sale of grain, a subsequent buyer from seller, and subsequent buyer's agent with whom seller dealt, both of whom had prior knowledge of original sale contract, were liable to first buyer for conversion of the grain. Civ.Code, §§ 1745, 1763, subd. 3.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by the Grange Company against Julia A. McCabe and others for conversion of grain. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

Stephen P. Galvin, of Merced, C. R. Perrier, of Gustine, and Richard S. Goldman, of San Francisco, for appellants.

Dennett & Zion, of Modesto, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a consolidated appeal by separate defendants, taken from a judgment in conversion.

On June 24, 1936, Julia A. McCabe entered into the following contract:

"Merced, Calif., June 24, 1936.

"In consideration of the price herein-after named, Julia A. McCabe, the seller, has sold and The Grange Company, the buyer, has bought about 2400 sacks of grain, which said seller agrees to deliver, properly threshed, cleaned and sacked in

new grain sacks, F.O.B. cars Simon Newman warehouse in Ingomar, Calif., by not later than the 30th day of December, 1936.

No. of Sax Sold	Kind of Grain
Abt. 2500	Bly
Quality	Price per cwt.
Equal to Sample	\$1.00 plus
	Salvage value
	of the bags.

"Payment to be made when crop is delivered as above, on net weight, sacks to become property of the buyer. The seller guarantees that he is the sole owner of said property, free from all encumbrances, except as specified None. 60% of purchase price to be paid on or before July 1st, 1936. Balance to be paid at time of shipment on destination weights. Purchase sample furnished by Buyer. Julia A. McCabe. Signed by

"W. W. Bunker, Seller.

"The Grange Company,

"By John W. Salter, Buyer."

Payment was not made nor tendered on or before July 1, 1936, and when on July 14th, the Grange Company sent to Mrs. McCabe a check for \$2,250 as part payment, the check was promptly returned with a letter stating that inasmuch as the Grange Company had failed to live up to the contract the sale was canceled. Some days thereafter Mrs. McCabe sold the grain to Wangenheim, as agent for Simon Newman Company. The Grange Company then brought this action in conversion.

The court held that the transaction evidenced by the foregoing instrument was a sale and that title to the grain passed to plaintiff as of June 24, 1936; found that plaintiff had been damaged, and gave judgment for such loss by computing the difference between the agreed price and the highest market price for a similar commodity between that date of sale and December 30, 1936, the last day of delivery under the agreement.

The objection of Bunker and McCabe to this judgment was that the court failed to apply the correct measure of damage applicable to a case of conversion; and Simon Newman Company, a corporation, and E. S. Wangenheim in addition to attacking the measure of damage applied by the court, also contended that plaintiff failed to establish title or right of possession to the grain; that neither Simon Newman Company, a corporation, nor

Wangenheim were parties to the conversion, if any, and that Wangenheim, acting only in a representative capacity, could not be held personally liable.

[1] In regard to the question of the passing of title it is held in *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 P. 248, 9 Am.St.Rep. 199, that whether or not title had passed under the terms of an agreement was one of intention of the parties, which intention was to be gathered from the language of the parties considered in the light of all the circumstances. Here the language of the agreement seemed to indicate the parties themselves considered the transaction as a sale. All of the grain in question had been grown on the McCabe ranch and stored in the warehouse of Reed & Hesse, and the Grange Company had acquired the grain of Reed & Hesse as well as the McCabe grain, and the only thing to be done by Mrs. McCabe under her agreement was to furnish to the buyer the weights and number of sacks of grain to be delivered in order to collect the selling price. The evidence is sufficient to establish that these parties intended to effect a present sale, and the court so found. *Lassing v. James*, 107 Cal. 348, 40 P. 534; *Hamilton v. Klinke*, 42 Cal.App. 426, 183 P. 675.

[2] As to the attempted rescission the duty rested upon defendant McCabe to deliver the grain at the specified place and to notify plaintiff of the net weight before she could demand payment. Also before the seller could rescind she must have by notice or some overt act indicated her intention to so rescind. Sec. 1781, Civ. Code. This was not done.

The next question to be determined is whether or not the court applied the proper measure of damage upon the conversion. Section 3336 of the Civil Code provides that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion. From the evidence it would appear that on July 14, 1936, Bunker, the agent for Mrs. McCabe, telephoned the Grange Company that he considered the contract canceled and rescinded for the reason that the Grange Company had failed to tender 60 per cent of the purchase price of the grain on or before July 1st.

On July 14th, after the conversation with Bunker, the Grange Company mailed to

Mrs. McCabe its check for \$2,250 as first payment under the contract, but this was returned by Mrs. McCabe on July 18th, in a letter to the Grange Company reciting that the check was returned for the reason that the company had failed to live up to its contract, and that the sale was canceled. It would therefore appear that no later than July 18th, plaintiff had knowledge of the attempted rescission of the sale and conversion by defendants McCabe and Bunker.

Examining the testimony we find that the only evidence introduced by the Grange Company pertaining to values referred not to July but to August, it being the theory of plaintiff that the conversion occurred some time in August, when an action was brought in Merced county to replevin the grain. It was then, so plaintiff claims, it first had definite knowledge that it was not to get possession of the grain. No testimony is found in the record as to any value of grain during the month of July, although it does appear the trial judge stated to plaintiff that in his opinion evidence of value of that date should be established.

[3] Inasmuch as section 3336 of the Civil Code requires that the value of the property be fixed as of the time of the conversion, we believe that the court erred in admitting evidence as of August rather than July 18th.

As the record now stands there is no evidence from which the court could determine the damage sustained by plaintiff.

[4] The answer of defendants Simon Newman Company and Wangenheim admits prior knowledge of the sale of the grain to the Grange Company. Section 1745 of the Civil Code provides that a purchase from a seller in possession obtains good title provided he has received and paid value for the goods without notice of a prior sale. Also section 1763 of the Civil Code, subdivision 3, provides that where goods are in the possession of a person other than the seller, the title of the buyer is good as against third persons having notice of the sale. Here the grain was in the warehouse of Reed & Hesse, and not in the possession of McCabe, the seller.

Having determined the transaction between the Grange Company and McCabe constituted a sale, and both defendant Simon Newman Company and defendant

Wangenheim having notice of the prior sale, are liable, whether acting as principal or agent.

In view of the foregoing, the judgment is reversed, and the cause is remanded to the trial court to fix and determine the amount of damage sustained by plaintiff as provided in section 3336 of the Civil Code.

We concur: THOMPSON, J.; PLUMMER, J.



26 Cal.App.2d 650

W. & J. SLOANE v. BARNETT.

Civ. 11770.

District Court of Appeal, Second District,
Division 2, California.

June 1, 1938.

1. Appeal and error ⇨907(2)

In absence of record presenting evidence received in trial court, it must be assumed that evidence was ample to sustain findings.

2. Appeal and error ⇨907(3)

A judgment for plaintiff on an open book account for merchandise sold and on account stated would be affirmed where appeal was taken upon judgment roll alone, complaint stated a cause of action, findings were in conformity with allegations of complaint, and judgment was supported by the findings.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by W. & J. Sloane, a corporation, against Anna Laura Barnett, individually and as administratrix of the estate of Jackson Barnett, deceased, to recover the balance due on an open account for merchandise sold and upon an account stated. From a judgment for plaintiff, defendant appeals.

Affirmed.

Anna Laura Barnett, in pro. per.

J. E. Simpson, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff sought judgment against defendant, basing its claim on two causes of action, one for a balance due on an open book account for merchandise sold and the other upon an account stated. Defendant appeals from a judgment in plaintiff's favor.

[1,2] Defendant contends that the action is barred by section 337 of the Code of Civil Procedure; that the judgment was for "more than the merchandise was worth"; and that the sum charged "is more than the value of the merchandise". The appeal is upon the judgment roll alone and therefore the evidence received by the trial court is not before us. In the absence of a record presenting the evidence received in the court below it must be assumed that the evidence was ample to sustain the findings. *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 P. 659. The complaint states a cause of action, the findings are in conformity with the allegations of the complaint and the judgment is supported by the findings. No error appears upon the record before us.

The judgment is affirmed.

I concur: McCOMB, J.

CRAIL, P. J., did not participate in the decision of the case.



26 Cal.App.2d 700

PEOPLE v. YOUNG.

Cr. 3088.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1938.

1. Criminal law ☞1144(13)

On appeal from judgment convicting defendant for a sex perversion after trial by jury and from an order denying his motion for a new trial, the evidence was viewed most favorably to the people. Pen.Code, § 288a.

2. Sodomy ☞6

A judgment convicting defendant for a sex perversion would not be disturbed on ground of insufficiency of evidence, where

there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material fact upon which the judgment was predicated. Pen. Code, § 288a.

3. Criminal law ☞1149

A trial judge's ruling denying defendant's application for permission to file an additional plea of not guilty by reason of insanity will not be disturbed on appeal, except on a showing of abuse of discretion by the trial judge.

4. Criminal law ☞286

The denial of defendant's motion for permission to enter an additional plea of not guilty of a sex perversion by reason of insanity was in the exercise of the trial court's sound discretion, where more than four months had elapsed from the time of the original arraignment until the date of trial and the defendant had made several intervening court appearances without making any application for permission to file such additional plea. Pen.Code, § 288a.

5. Criminal law ☞938(1), 1156(3)

A motion for a new trial on ground of newly discovered evidence is addressed to the sound legal discretion of trial judge, whose action will not be disturbed on appeal except on a showing of abuse.

6. Criminal law ☞961, 1158(1)

Where conflicting affidavits are filed on motion for new trial, the question of fact is for trial judge's determination, and his determination will not be disturbed on appeal if there is substantial evidence to sustain his finding.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William Young was convicted for a sex perversion, and he appeals.

Affirmed.

Harvey L. Silbert, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Appellant was convicted after trial by jury of violating section 288a of the Penal Code. This appeal is from the judgment and order denying his motion for a new trial.

[1] Viewing the evidence most favorable to the People (respondent), the essential facts are:

July 5, 1937, defendant committed an act prohibited by section 288a of the Penal Code.

Defendant relies for reversal of the judgment on the following propositions:

First: The evidence is insufficient to sustain the judgment.

Second: The trial court committed prejudicial error in denying (a) defendant's motion for permission to enter an additional plea of not guilty by reason of insanity, and (b) defendant's motion for a new trial on the ground of newly discovered evidence.

[2] Defendant's first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material fact upon which the judgment of guilty was predicated. *Thatch v. Livingston*, 13 Cal.App. 2d 202, 56 P.2d 549; *People v. Groves*, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399. We therefore refrain from further discussion of the evidence.

[3] The proposition set forth in paragraph (a) of defendant's second proposition is likewise untenable. The law is settled that the trial judge's ruling denying defendant's application for permission to file an additional plea of not guilty by reason of insanity will not be disturbed on appeal, except upon a showing of abuse of discretion by the trial judge. *People v. Morgan*, 9 Cal.App.2d 612, 615, 50 P.2d 1061.

Defendant was arraigned August 26, 1937, and on his motion time to plead was continued to August 30, 1937. On this last date time to plead was continued to September 8, 1937, and defendant was ordered transferred to the Los Angeles General Hospital for observation and examination as to his mental condition. After several intervening continuances on September 17, 1937, defendant entered the single plea of not guilty, and trial of the case was set for October 22, 1937. Sub-

sequent thereto the case was continued and finally called for trial January 4, 1938, on which date defendant made a motion to add the additional plea of not guilty by reason of insanity, which motion was denied by the trial judge, the physician at the General Hospital having reported to the court that defendant showed no evidence of mental disease.

[4] Since over four months had elapsed from the time of the original arraignment until the date of trial, with several intervening court appearances by the defendant, and no application for permission to file an additional plea of not guilty by reason of insanity having been made, it is obvious that the trial court in denying the motion here questioned exercised a sound discretion.

[5] The proposition set forth in paragraph (b) of defendant's second proposition is also without merit. A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound legal discretion of the trial judge, whose action will not be disturbed on appeal except upon a showing of abuse of discretion. *People v. Yeager*, 194 Cal. 452, 491, 229 P. 40; see, also, cases cited 8 Cal.Jur. (1922) 442, sec. 463, note 6; 4 Cal.Jur.Ten Year Supp. (1936) 761, sec. 463, note 6.

[6] Defendant filed affidavits on the ground of newly discovered evidence alleging in substance that after the complaining witness had testified she made statements in the presence of affiants contrary to the testimony which she had given in open court. The People filed counter-affidavits in which it was alleged that the complaining witness had not made the statements attributed to her in the affidavits filed on behalf of defendant. On a motion for a new trial, where conflicting affidavits are filed, the question of fact is one for the determination of the trial judge and his determination will not be disturbed upon appeal if there is substantial evidence, as there was in the instant case, to sustain his finding. *People v. Lee Yick*, 189 Cal. 599, 610, 209 P. 538; 8 Cal.Jur. [1922] 442, sec. 463, note 9.

For the foregoing reasons the judgment and order are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

27 Cal.App.2d 41

**SCHUERMAN v. PACIFIC FREIGHT
LINES et al.**
Civ. 11782.

District Court of Appeal, Second District,
Division 2, California.

June 7, 1938.

1. Negligence ⇨136(6)

Where mere proof of happening of accident gives rise to inference of negligence resulting from application of doctrine of *res ipsa loquitur*, and inference of non-negligence of defendant or unavoidable accident may be drawn from evidence, whether defendant has successfully met and rebutted plaintiff's *prima facie* case of negligence is matter to be determined from all evidence by jury or trial judge sitting without a jury.

2. Negligence ⇨134(4)

Evidence that defendant truck driver, in unloading truck, had placed at rear of truck, where they could be removed from truck by plaintiff, four core bits which did not topple over, justified finding that there was no negligence as to plaintiff in placing of fifth core bit which rolled off back of truck and fell upon plaintiff's foot.

3. Appeal and error ⇨996

Where fair-minded men may honestly draw different conclusions from undisputed facts, a finding either way, supported by an inference reasonably drawn from evidence by trier of fact, will not be disturbed by an appellate court.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Rudolph Schuerman against the Pacific Freight Lines and another to recover damages for personal injuries sustained while assisting in unloading core bits from the named defendant's truck. Judgment for defendants, and plaintiff appeals.

Affirmed.

James M. Carter, of Los Angeles, for appellant.

Chase, Barnes & Chase and Thomas R. Suttner, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for personal injuries plaintiff appeals.

The essential facts are:

September 10, 1936, defendant Jacobus, while in the employ of defendant Pacific Freight Lines, drove a truck and semi-trailer to the F & S Welding Company's yard in the city of Maywood. Plaintiff, who was in the employ of the F & S Welding Company, after the truck was parked, came to help defendant Jacobus unload from it core bits. Defendant Jacobus picked up, one at a time, the core bits which were located on the front part of the semi-trailer and carried each approximately fourteen feet to the rear end of the truck, where he stood them on their flat ends. Five of the core bits were thus placed. In the meantime plaintiff, standing on the ground, removed three of the core bits and carried them to a wheelbarrow. After placing the fifth core bit at the rear of the semi-trailer defendant Jacobus started to turn to get the last core bit on the front of the truck, when he heard a thud and on turning around saw the fifth core bit which he had just placed at the rear of the truck rolling toward the back of it. He called to plaintiff, but before plaintiff was able to remove himself from danger the bit fell upon his foot and seriously injured him.

Plaintiff relies for reversal of the judgment on this proposition:

The case is a proper one for the application of the doctrine of res ipsa loquitur and therefore there is not substantial evidence to sustain the trial court's finding, to-wit:

"That neither of these defendants was careless or reckless or negligent in any particular or manner whatsoever mentioned in plaintiff's complaint."

[1] This proposition is untenable. We assume, without deciding, that this is a proper case for the application of the doctrine of *res ipsa loquitur*. The law is established in California that where mere proof of the happening of an accident gives rise to an inference of negligence resulting from the application of the doctrine of *res ipsa loquitur* and also an inference of non-negligence of defendant or unavoidable accident may be drawn from the evidence, it is for the jury or trial judge sitting without a jury to determine from all the evidence whether the defendant has successfully met and rebutted plaintiff's *prima facie* case of negligence, *Michener v. Hutton*, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480; *Brown v. Davis*, 84 Cal.App. 180, 186, 257 P. 877; *Lejeune v. General Petroleum Corp.*, 128 Cal.App. 404, 416, 18 P.2d

429; 45 C.J.(1928) 1221, sec. 784; Seitzman v. Srere Corp., 116 Cal.App. 674, 678, 3 P.2d 58; Buffums' v. City of Long Beach, 111 Cal.App. 327, 332, 295 P. 540.

[2] In view of the uncontradicted testimony that four core bits had been placed on end at the rear of the truck by defendant Jacobus without toppling over, the trial court may have reasonably drawn the inference that the fifth core bit so placed by defendant Jacobus was placed in a reasonably prudent manner and without negligence, therefore affording substantial evidence to sustain the finding questioned here.

[3] This case well illustrates the oft-announced rule that, where fair-minded men may honestly draw different conclusions from the undisputed facts, a finding either way supported by an inference reasonably drawn from the evidence by the trier of fact, be it judge or jury, will not be disturbed by an appellate court.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



27 Cal.App.2d 1

WILTON v. CLARKE et al.

Civ. 11773.

District Court of Appeal, Second District,
Division 2, California.

June 6, 1938.

1. Appeal and error 931(1), 996

Evidence 595

The trial court may make any inference of fact which may be drawn from the evidence before it or from the facts found by it, and if from the facts which it has found other facts may be inferred which will support the judgment it will be assumed that trial court made such inferences and reviewing court will not draw an inference contrary to that drawn by the trial court to defeat the judgment.

2. Contracts 313(2)

To charge a party with repudiation of a contract it must appear that party's refusal to perform was absolute and unequivocal

and must have been treated and acted upon as such by the parties to whom the promise was made.

3. Brokers 86(1)

Where evidence showed owner agreed to pay broker commission in event of sale or exchange of certain realty and owner refused certain offer of purchase after which broker and owner made further negotiations and broker showed no intention of treating refusal of offer as repudiation of contract, finding that owner did not repudiate agreement between parties was proper.

4. Brokers 54

Where owner agreed to pay broker commission for consummation of the sale or exchange of certain realty upon terms subject to the approval of owner and owner rejected offer of prospective purchaser within 10 days prescribed by agreement and evidence showed that prospective buyer was not ready and able to make the purchase, broker was not entitled to commission on ground that he found buyer ready, able and willing to purchase realty.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Hugh Wilton against A. B. Clarke and another for services rendered as a real estate broker. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Bates S. Himes and A. P. G. Steffes, both of Los Angeles (Calvin L. Helgoe, of Los Angeles, of counsel), for appellant.

John Leslie Goddard, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff commenced this action to obtain a judgment against defendants for services rendered as a real estate broker. In the first cause of action he alleges that a purchaser was found for the property of defendants. In the second cause of action he sues for the value of services rendered at the request of defendants. He prosecutes this appeal from a judgment in defendants' favor and from an order denying a motion to vacate the judgment.

Defendants were the owners of an apartment house known as the "Boynton". They authorized plaintiff by a written contract dated December 23, 1936, to act as exclusive agent for the sale or exchange of the prop-

erty. The agreement, which was to be in force for one year, provided for the payment of a broker's commission in the event of a sale or exchange. The agreement provided: "The amount of the sales price and the terms and conditions of its payment are to be subject to the approval of the undersigned or their rejection as hereinafter set forth." The agreement further provided: "In the event the said Hugh Wilton shall present to the undersigned a trade, exchange or a sale of the real property, specifying the price and terms of payment thereof, the undersigned will, within ten days after receipt in writing of such proposal to trade, exchange or sell said property, inform said Hugh Wilton as to their acceptance or rejection of same." On May 28, 1937, while defendants were in New York on vacation they received a letter from plaintiff's attorney presenting an offer for the purchase of the Boynton for the sum of \$75,000, of which \$35,000 was to be cash, the buyer to assume encumbrances not to exceed \$40,000. Defendants rejected the offer and plaintiff commenced this action on July 27, 1937.

Plaintiff now contends that the rejection of the offer received May 28 was in fact a repudiation of the entire agreement and gave him a right of action against defendants. The trial court held that defendants did not repudiate the agreement. The letter to defendants telling of the prospective purchaser was answered by the following telegram: "The Boynton is not for sale to anyone at this time." On the same day defendants wrote to plaintiff and his attorney a letter containing the following: "Confirming my telegram of even date. The Boynton is not for sale to anyone at this time. Mr. Goddard will have our address from time to time in case you wish to get in touch with us." On May 29, 1937, upon receipt of the telegram from defendants, counsel for plaintiff wrote a letter to defendants containing the following: "If you are willing to accept the deal Mr. Wilton will continue to negotiate and to consummate it pursuant to the offer." On June 4, 1938, defendants telegraphed plaintiff as follows: "Present indebtedness more than Forty thousand Stop With improvements recently added make offer insufficient Stop Will return by the twentieth." When Mr. Clarke returned from vacation he went to Mr. Wilton's office, but although Mr. Wilton was in the office Mr. Clarke was unable to see him.

[1-3] We are satisfied that the evidence is sufficient to justify the holding of the trial

court that defendants did not repudiate the agreement between the parties. The rule governing the functions of the trial court in drawing inferences from the evidence is well stated in *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 656, 77 P. 659: "It is the province of the trial court to make any inference of fact which may be drawn from the evidence before it, or from the facts found by it, and if, from the facts which it has found, other facts may be inferred which will support the judgment, it will be assumed that the trial court made such inferences. If different inferences may be drawn from those facts, this court will not, upon an appeal from the judgment, draw an inference contrary to that drawn by the trial court, or which will have the effect to defeat the judgment of that court." In order to charge a party with repudiation of a contract it must appear that his refusal to perform was absolute and unequivocal and it must have been treated and acted upon as such by the party to whom the promise was made. *Rauer's Law & Collection Co. v. Harrell*, 32 Cal.App. 45, 162 P. 125; 13 Cor. Jur. p. 654, § 727; *Dingley v. Oler*, 117 U. S. 490, 503, 6 S.Ct. 850, 29 L.Ed. 984. The telegram of May 28, sent while defendants were absent from the state on vacation, did not state that the property would not be sold at any time. Apparently plaintiff did not regard the telegram as a repudiation of the agreement for he immediately answered by letter suggesting the continuation of the negotiations to sell to the party who had made an offer for the property. This was followed by the telegram of June 4, from defendants, sent within ten days from the receipt of the offer, in which it was pointed out why the offer could not be accepted, and the statement was added informing plaintiff that defendants would return "by the twentieth". Upon defendants' return an attempt was made to discuss the matter with plaintiff. From these facts and the inferences which the trial court was authorized to draw it is apparent that the reviewing court may not hold that the ruling of the trial court is not sustainable.

[4] There is no merit in plaintiff's contention that he is entitled to judgment upon his first cause of action, in which he alleges that he found a buyer ready, able and willing to purchase the apartment house. The trial court found upon sufficient evidence that the prospective buyer was not ready and able to make the purchase. Moreover, the terms of the offer were subject to the

approval of defendants, who, within the ten days prescribed by the agreement, rejected the offer.

The judgment and the order denying plaintiff's motion to vacate the judgment are affirmed.

We concur: CRAIN, P. J.; McCOMB, J.



26 Cal.App.2d 694

AKERS et ux. v. COWAN.

Civ. 1882.

District Court of Appeal, Fourth Appellate
District, California.

June 2, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

1. Appeal and error ⇐1001(1)

In intersectional automobile collision action, the fact that certain physical facts would sustain a judgment for defendant motorist did not require reversal of judgment for the plaintiff, especially where the physical facts themselves were in conflict and portions of the evidence relating to the physical facts would sustain the verdict as rendered.

2. Automobiles ⇐246(56)

In intersectional automobile collision action, an instruction on speed of automobile permissible in residential sections and speed permissible at intersections, which set out the Vehicle Code rule applicable in a criminal prosecution, in which an accused is charged with traveling at a rate of speed higher than the prima facie limit set forth in the statute, wherein the burden is placed upon the accused, was erroneous. St.1935, p. 176, §§ 510, 511(a, c); p. 177, § 513.

3. Trial ⇐296(3)

In intersectional automobile collision action wherein speed of defendant's automobile was important, an erroneous instruction setting out rule applicable in a criminal case in which an accused is charged with traveling at a rate of speed higher than prima facie limit set forth in the statute, wherein burden is placed upon accused, was not cured by giving of other correct instructions, which themselves were slightly

confusing, where the instructions were in direct conflict, and the evidence was evenly balanced. St.1935, p. 176, §§ 510, 511(a, c); p. 177, § 513.

4. Trial ⇐205

In an intersectional automobile collision action, wherein an issue was whether the speed of the defendant's automobile was a violation of law under the circumstances, the jury should have been correctly instructed with reference to the burden of proving the issue. St.1935, p. 177, § 513.

5. Trial ⇐296(1)

The giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by W. F. Akers and wife against C. E. Cowan for injuries sustained in an automobile collision. From an adverse judgment, the defendant appeals. Reversed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

David E. Peckinpah and Harold M. Child, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages on account of injuries sustained by the plaintiffs in an automobile collision which occurred at the intersection of two streets in an outlying section of the city of Fresno. Through a cross-complaint the defendant also sought to recover damages. A jury brought in a verdict for \$3,000 in favor of the plaintiff husband, but awarded nothing to the plaintiff wife. From the ensuing judgment this appeal was taken.

[1] The appellant first contends that certain physical facts which appear in the evidence are sufficient to demonstrate that the testimony in favor of the respondents is unworthy of belief, and that it follows that the evidence is not sufficient to sustain the verdict. This contention is without merit. In *People v.*

Salazar, 73 P.2d 937, this court said (page 938):

"It has been frequently pointed out that what actually occurs in accidents of this nature cannot be conclusively determined from the positions and conditions in which the cars are left and from the application of the laws of physics because of the many elements and uncertainties which necessarily exist. *Nagamatsu v. Roher*, 10 Cal.App.2d 752, 53 P.2d 174, and cases there cited. In *Hawthorne v. Gunn*, 123 Cal.App. 452, 11 P.2d 411, we said: 'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred.'"

The evidence as to the "physical facts" pointed out by the appellant is in itself conflicting. While a large part of the evidence, including a part of that relating to physical facts which were observable afterwards, would have amply sustained a judgment in favor of the appellant, it is equally true that other portions of the evidence are sufficient to sustain the verdict as rendered.

[2] It is next urged that the court erred in instructing the jury as to the law regulating the speed of automobiles at the place in question and the burden of proof with respect thereto. The appellant had testified that he drove through this intersection at a speed of between twenty-five and thirty miles an hour and whether or not he was negligent in so doing was one of the main issues presented to the jury. At the request of the respondents the court instructed the jury as follows:

"You are instructed that the legal obligations resting upon the parties to this action at the time and place of the said collision, and their respective rights, are governed by the following provisions of the Vehicle Code, St.1935, p. 176:

"510. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

"511. The speed of any vehicle upon a highway not in excess of the limits specified in this section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 hereof.

"The speed of any vehicle upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in section 510 hereof at the time, place and under the conditions then existing."

"The prima facie limits referred to above, in so far as they are applicable to this case, are as follows:

"(a) Fifteen miles per hour when traversing any intersection of highways if during the last one hundred feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of one hundred feet along all such highways.

"(c) Twenty-five miles per hour in any residence district."

The jury was thus told that the prima facie speed limits applicable to this case were fifteen miles per hour when traversing a blind intersection and twenty-five miles per hour in any residence district. There was no evidence that this was a residence district as defined in the code. There was evidence showing it was a blind intersection within the meaning of that provision of the code, although the appellant argues that the fifteen-mile prima facie limit did not apply since stop signs had been erected on both sides of the street on which these cars were traveling. However, there is no evidence that these stop signs had been placed there by the proper authorities and for the purposes of this opinion we will assume that the prima facie speed limit of fifteen miles was here applicable.

In connection with the prima facie speed limits thus given to the jury the above instruction included the second paragraph of section 511 of the Vehicle Code, which sets forth the rule applicable in criminal actions where a defendant is charged with traveling on a highway at a rate of speed higher than the prima facie limits set forth in that section. In such a case the burden is placed upon the defendant of proving that any speed in excess of these limits did not constitute a violation of the basic rule set forth in section 510. A contrary rule prevails in civil actions, which rule is set forth in section 513 of this code.

The question of speed was here material and important and the giving to the jury of this wrong instruction with reference to the burden of proof in connection with that issue was plainly erroneous. *Anderson v. Mothershead*, 19 Cal.App.2d 97, 64 P.2d 995.

The court also read to the jury section 513 of this code, as follows: "In any civil action proof of speed in excess of any prima facie limit declared in section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence."

Later on the court gave another instruction, reading as follows: "Although the driving of a motor vehicle in excess of the limits specified by the Vehicle Code does not constitute negligence as a matter of law, still such violation, if any, on the part of the defendant may be considered by you along with such other evidence as may have been introduced upon the subject, in determining the guilt or innocence, of the defendant of the charges made in plaintiffs' complaint; that is, in determining whether or not he acted with ordinary care under the circumstances of the case, but this rule has no application to the basic speed law as defined in the said code, which prohibits a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, or which endangers the safety of persons or property, and the violation of such basic law or of any other express provision of the Vehicle Code, as hereinbefore stated to you, in any other particular, except as to the speed limit specified therein, constitutes negligence as a matter of law."

[3,4] The question remains whether the error mentioned was cured by these other instructions. It may first be observed that the instruction last quoted is at least somewhat confusing in that after saying that although driving in excess of the limits specified by the Vehicle Code does not constitute negligence as a matter of law, it states that "such violation" on the part of the defendant may be considered by the jury in determining whether he was negligent. It might well be that such an excess of speed would not constitute a violation of law in a

civil case. In determining whether such an excess of speed was in fact a violation of law under the circumstances the jury should have been plainly and correctly instructed with respect to the burden of proof. The instruction last quoted had a tendency to continue the previous error and to confuse rather than to clarify the entire matter.

[5] Since section 513 was also read the jury was given two conflicting instructions relating to the burden of proof in this connection, the first of which, although clearly erroneous, was particularly tied in with and directly related to two of the prima facie limits of speed referred to in the same section of the code. It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict. *Pierce v. United Gas Co.*, 161 Cal. 176, 118 P. 700; *Rathbun v. White et al.*, 157 Cal. 248, 107 P. 309; *Fogarty v. Southern Pacific Co.*, 151 Cal. 785, 91 P. 650; *Zolkoske v. United States Farm & Land Co.*, 72 Cal. App. 63, 236 P. 344; *Gaster v. Hinkley*, 85 Cal.App. 55, 258 P. 988; *Maggini v. West Coast Life Ins. Co.*, 136 Cal.App. 472, 29 P.2d 263. In *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599, the court said (page 603):

"It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

The evidence in this case is not only sharply conflicting, but is so nearly evenly balanced that it would seem from the written record that the matter of upon which side lay this burden of proof may well have been determinative upon the question of appellant's negligence as presented to the jury. The appellant was entitled to have that matter clearly and correctly presented by the instructions. The first instruction on that subject contained matter which was not only erroneous but which had no place in any civil action and, under the circumstances here appearing, the giving of the same must be held to have been prejudicial.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



27 Cal.App.2d 74

JOHNSON v. FLANERY et al.

Civ. 5859.

District Court of Appeal, Third District,
California.

June 9, 1938.

1. Mortgages ☞376

Trustees selling property under trust deed to beneficiary for amount including delinquent taxes, which beneficiary agreed to pay when note secured by trust deed was signed and did pay trustees after sale, cannot be considered as holding amount thereof for trustor's use, so that latter cannot recover such amount from trustees.

2. Mortgages ☞376

Trustor being obligated to pay delinquent taxes permitted to accumulate in violation of trust deed, under which trustees sold property to beneficiary for amount including such taxes, which beneficiary agreed to pay when note secured by trust deed was signed, is in no position to claim that amount bid by beneficiary created surplus which should be paid to trustor by trustees.

Action by F. E. Johnson against S. J. Flanery and another, as trustees for Frank Casey under a trust deed executed by plaintiff, to recover the amount of delinquent taxes paid by the beneficiary after purchasing the mortgaged property at trustees' sale for an amount including taxes due. Judgment for defendants, and plaintiff appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

Russell W. Cantrell, of San Francisco, and W. E. Davies, of Marysville, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, as trustor in a deed of trust executed in favor of defendants as trustees for Frank Casey, is endeavoring by this action to recover from respondents as such trustees \$1,974.16, together with interest. The facts in this case are substantially the same as are set forth in *Casey v. Nishihara et al.*, 213 Cal. 467, 2 P.2d 778, so we need not again repeat them except to say that the trust deed in question was executed by plaintiff and appellant T. E. Johnson upon a piece of real property in the county of Yuba, and was given to secure the repayment of \$14,340.72. At the time of the execution of the deed of trust the sum actually owing was \$12,366.56. There was then existing, however, and a charge against the real property, certain delinquent taxes in the sum of \$1,974.16. Upon the promise of Casey to discharge these tax delinquencies for Johnson this amount was added to the principal obligation. Casey failed to keep his promise to discharge these tax liens, and had not done so up to and at the date of sale of the property under the deed of trust. The property was sold by the trustees at public auction to the beneficiary, Casey, for \$15,799.46, which amount included the \$1,974.16 for delinquent taxes. Subsequent to the purchase by Casey, he paid the sum of \$1,974.16, together with all accruing costs, penalties and charges, and redeemed the real property from the delinquent taxes.

It is the contention of appellant that he, as trustor, has a right to recover from the trustees the difference between the amount that the beneficiary bid at the time of the sale and the amount actually owing

Appeal from Superior Court, Yuba County; Harry Deirup, Judge.

under the promissory note for which the trust was executed as security.

One of the points urged by appellant is that Casey, in bidding an amount greater than the actual amount due, thereby prevented others from bidding, but the trial court specifically found, and we have no evidence to the contrary before us, that there was no competitive bidding for the property at the sale.

[1] It must be admitted that the bid of Casey was, to the extent of \$1,974.16, in excess of the amount actually due at the time of the sale, but inasmuch as it was specifically agreed between Casey and Johnson when the note was signed that Casey was to pay this item of delinquent taxes, the application by Casey of this amount was with the express permission of the trustor, and having thus discharged his obligation by the payment of the tax out of the surplus arising from the sale the trustees cannot now be considered as holding this surplus for the use of trustor. There can be no doubt that if Casey had paid the tax prior to the sale it would have been a proper charge against the land, and because he paid it after the sale in accordance with the prior agreement as to payment, does not entitle the trustor to claim the amount.

On the appeal in *Casey v. Nishihara*, supra, the court held that the detriment suffered by Johnson, the trustor, was the interest charged against him on the sum of \$1,974.16, and Johnson was given credit for these interest payments. We cannot see how Johnson has been injured to any greater extent.

[2] It is unquestioned that if a deed of trust requires the trustor to pay the taxes upon the security and he defaults therein, the beneficiary may himself pay the tax and the amount thereof to the total indebtedness and require the property to be sold for the full amount of the indebtedness. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 P. 922.

The same condition prevailed in the instant case, and Casey, obligated to pay the tax, added it to the total indebtedness and bid the property in for the amount of the full indebtedness. As the trial judge said in his opinion:

"He owed the money to Casey in that, by permitting the taxes to accumulate in violation of the terms of the previous mortgage he had reduced Casey's security,

and suit could have been brought against him by the state. Pol. Code, § 3771. Casey paid other delinquent taxes for the protection of Johnson as well as himself but did not have cash enough to cover this item at the time. He assumed the obligation, and in return Johnson was obligated to him. Johnson was not damaged, for the interest on the taxes was the same as on the note, aside from penalties with which he is not charged. As was held in *Casey v. Nishihara*, 213 Cal. 467, 2 P.2d 778, Casey was not entitled to interest on the excess portion of the note. That interest was not due until the taxes were paid. But we are now dealing with a different angle of the transaction. If some other person had bid \$12,366.56 for the property, Johnson would have been in a position to claim that such bid, being subject to all of the taxes, would have been \$1,974.16 higher if Casey had paid these taxes and, on that theory, he might have sued Casey for that sum. In view of the fact that the delinquent taxes were Johnson's own obligation, he is not in a position to claim that the amount bid created a surplus which should be paid to Johnson."

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



26 Cal.App.2d 717

In re TRELUT'S ESTATE.

TRELUT v. JENKS et al.

Civ. 62.

District Court of Appeal, Second District
Division 1, California.

June 3, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

I. Appeal and error ☞999(1), 1008(1)
Trial ☞139(1)

The sufficiency of the evidence is generally a matter for the trial court or jury and the findings or verdict will not be lightly set aside.

2. Appeal and error ☞996, 1010(1), 1011(1)

A finding of a trial court that property is either separate or community in character is binding and conclusive upon the appel-

late court, if the finding is supported by sufficient evidence or is based on conflicting evidence or upon evidence that is subject to different inferences.

3. Appeal and error ⇨1010(1)

A finding against a presumption is binding upon the appellate court unless the rebuttal evidence is so weak and improbable that the finding is without substantial support.

4. Husband and wife ⇨270(9)

Whether the evidence is sufficient to overcome the presumption in favor of community property is a question of fact for the court or jury. Civ.Code, § 164.

5. Husband and wife ⇨264

Evidence warranted finding that property of deceased constituted separate property and not community property within provision of will bequeathing all his property which was not community property to his wife for life with the corpus thereof to his nephew. Civ.Code, §§ 158, 164.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of Octavius F. Trelut, deceased, wherein Ben B. Jenks was appointed executor. Leon L. Trelut filed a petition for determination of heirship and interests in the estate. From the judgment Florence H. Trelut, widow, appeals.

Affirmed.

Dailey S. Stafford, of Los Angeles, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent Leon L. Trelut.

YORK, Presiding Justice.

By his last will and testament, Octavius F. Trelut (now deceased), bequeathed to his wife, appellant herein, all of his household effects and his automobile, and devised and bequeathed the entire residue of his estate to one Coles, in trust for the benefit of his said wife during her life and upon her death the trust to terminate and the corpus thereof to be distributed to Leon L. Trelut. It was further provided by the terms of said will, as follows: "I hereby specifically declare that it is my intention herein only to devise and bequeath my separate property and the interest in the com-

munity property of myself and my wife, of which I am entitled to dispose by will, and I expressly provide that my wife shall be entitled to her share of said community property, and also entitled to all of the rights and privileges given her herein."

The will was duly admitted to probate and during the course of administration, respondent Leon L. Trelut, who is the son of a brother of decedent, filed a petition for determination of heirship and interests in said estate, alleging that a dispute had arisen between him and appellant concerning their respective interests in said estate and under the will, and that appellant claimed the entire estate of decedent was community property. This petition came on for hearing in connection with the hearing on a first account current of executor and several other matters.

Thereafter the court found: "That the acts of Octavius F. Trelut and Florence H. Trelut from the time of their marriage clearly indicate that it was their intent and understanding that the respective properties obtained by them in any manner during the course of their marriage should be divided between them and thereupon become and remain the separate property of each of them respectively. That as property was accumulated by said Octavius F. Trelut and Florence H. Trelut during the period of their marriage, said properties were divided between them by agreement. That as a part of said division of said property it was agreed by and between said Octavius F. Trelut and said Florence H. Trelut that the property so divided and placed in their respective names should become and remain the separate property of each of them. That the property standing in the name of the decedent Octavius F. Trelut at the time of his death and listed in the inventory and appraisal on file in the within estate, was the separate property of said Octavius F. Trelut and was not community property of said Octavius F. Trelut and Florence H. Trelut."

From that part of the judgment which was thereafter entered determining all of the property of the above estate to be the separate property of decedent, appellant takes this appeal and urges that the evidence is insufficient to sustain the finding above quoted. Appellant's opening brief was filed by Thomas B. Reed, and subsequent to the filing of respondent's reply brief there was substituted as attorney of record for appellant in the place and stead of said Thomas

B. Reed, Dailey S. Stafford, who filed appellant's closing brief herein.

Said appeal has come to this court upon an engrossed bill of exceptions containing the following testimony elicited upon direct examination of appellant:

"I am the widow of Octavius F. Trelut, deceased. We were married at Santa Monica, in the county of Los Angeles, state of California, on December 2, 1888, and have lived together as husband and wife continually from that time up to the time of his death on November 6, 1934. That at the time of our marriage I had not quite \$5,000.00 in cash. That was all. Mr. Trelut had no property at that time. He had some money he had loaned to an older brother Leon Trelut. I don't know how much. This brother turned over two lots to O. F. Trelut from which he got \$1,500.00 and no more. He put this into the Temple ranch property. There was no house upon it. After receiving this sum and during our married life Mr. Trelut paid his relatives in the north on numerous occasions various sums of money, the amounts and dates of which I cannot remember. Mr. Trelut never acquired any money or property after our marriage by gift, devise or descent. All of the property standing in Mr. Trelut's name, at the time of his death, was acquired after our marriage. We never had any agreement of any kind that our estates should be divided or that what was in Mr. Trelut's name should be considered as his separate property. In October 1897 there was purchased solely in the name of Mr. O. F. Trelut from Mr. Hartshorn certain real property as an orange grove. This property is a part (approximately six acres) of the present ten acre orange grove now in the estate of O. F. Trelut. In December 1899 Mr. Trelut and I bought certain real property from Mr. Grijalva. This property was an orange grove. This property was purchased solely in the name of Florence H. Trelut. This was done so that each of us would have an orange grove. In January 1903 there was purchased the additional four acres of real property which with the six acres purchased in October 1897, now comprises the ten acre orange grove now in the estate of O. F. Trelut. I sold the orange grove standing in my name to H. H. Church in October 1909. I received for this orange grove I sold about \$10,000 in cash and a note and mortgage back to me for \$3,750. I put the cash in my savings bank account. The orange grove purchased in O. F. Trelut's name was not sold and is a

part of the estate of O. F. Trelut. The real property in Covina, where I am now living and which I call the Home place, was purchased by us since our marriage solely in my name and now stands solely in my name. For more than twenty years last past I have had a separate commercial and separate savings account upon which I alone could draw. For more than twenty years last past Mr. Trelut has had a separate savings account and a separate commercial account upon which he alone could draw. Any moneys or income I received from the real property standing in my name I deposited in my savings bank account. Any money or income that was received from the real property standing in the name of O. F. Trelut was deposited in the separate bank accounts of O. F. Trelut. I have now about \$14,000 in my separate name in a bank account. Prior to October 1909 O. F. Trelut owed to the Covina Valley Savings Bank the sum of \$3,400.00 upon a promissory note secured by a mortgage on the present orange grove in the estate of O. F. Trelut. In October 1909 I used part of the proceeds of the sale of the orange grove which stood in my name, and which I call the Church property, and loaned to O. F. Trelut \$3,400.00 to pay off the above mentioned bank mortgage, and O. F. Trelut gave me a promissory note in the sum of \$3,400.00 secured by a mortgage on the present orange grove in the estate of O. F. Trelut. Since 1909 that note and mortgage has been renewed from time to time. I later advanced Mr. Trelut more money and the loan was increased, on September 18, 1923, to \$4,800.00, with the same property as security. Since 1909 O. F. Trelut regularly paid me interest on the \$3,400.00 note and since 1923 has regularly paid me interest on the \$4,800.00 note. These payments of interest have been deposited in my savings bank account. The loan in the sum of \$4,800.00 was last renewed on October 21, 1932. Since our marriage no property owned by either of us stood of record in our joint names. All property held by each of us stood of record either in the individual name of O. F. Trelut or of Florence H. Trelut. When certain bonds of the Mortgage Guarantee Co. were purchased by us a total face value of \$20,000 was acquired of which amount \$10,000 were placed in Mr. Trelut's name and \$10,000 were placed in my name. The \$10,000 placed in my name were purchased with my separate funds. The first property to be purchased by us after our marriage was what we called the Temple property;

that was June 11, 1890. Mr. Trelut used the \$1,500.00 that he got from his brother to pay on that. There was no house on the property and we both helped to pay for building the house."

Appellant further testified on cross-examination: "We never had any written agreement of any kind that our estates should be divided or that which was in Mr. Trelut's name should be considered as his separate property. On November 1, 1934, at the same time that O. F. Trelut executed his last will and testament which is being probated in this proceeding, I executed a mutual will and testament which was exactly the same as that executed by O. F. Trelut at said time, except that I devised and bequeathed all of my property to J. D. Coles to hold in trust during the lifetime of O. F. Trelut, and to pay to him the income during his said lifetime, and at the death of O. F. Trelut to transfer the property to Leon L. Trelut. About a month or two after the death of O. F. Trelut I destroyed the will I made on November 1, 1934. Since the death of O. F. Trelut I have executed and delivered to Thos. B. Reed, my attorney, a deed to an undivided one-half interest in the orange grove described in the inventory of O. F. Trelut's estate, to pay him for his services in connection with this estate. During the probate of this estate I filed a contest to the will of O. F. Trelut which I recently dismissed."

Other than this, the only evidence adduced at the hearing was (1) that of Ben B. Jenks, executor of said estate, to the effect that Mr. and Mrs. Trelut had for many years separate commercial accounts in his bank; that he knew of the note of Mr. Trelut made in favor of Mrs. Trelut for \$4,800 and that when interest was due thereon it was withdrawn from the account of Mr. Trelut and deposited to the checking or savings account of Florence H. Trelut; (2) that of Mr. Mullholland to the effect that he had known the Treluts for about thirty years; that he frequently visited at their home and had heard Mrs. Trelut on several occasions refer to the orange grove, being the same property which is now in the estate, as "Father's property", or "Father's grove", or "his property". "I never heard her refer to it as 'our property' or 'my property'. I once heard her say, 'I've got a note against father's property'. I also heard her say, 'I've got a note against "his property"', referring to O. F. Trelut"; (3) the testimony of J. D. Coles, cashier of the Covina Valley Savings Bank to the effect

that both Mr. and Mrs. Trelut had individual savings accounts in that bank.

The inventory, in addition to the orange grove, lists as assets of the estate a sum of money, \$10,000 worth of bonds of the Mortgage Guarantee Co. (referred to in appellant's testimony), a Buick automobile and many shares of stock and bonds.

The judgment herein orders paid in the course of administration the claim of appellant for \$4,800, plus interest from April 18, 1934, at 7 per cent, being the amount of the note secured by a mortgage on the orange grove included among the assets of the said estate.

Appellant urges that the finding, above recited, is directly contrary to the presumption established by section 164 of the Civil Code, while the evidence adduced and upon which the finding of separate property is based is the very evidence upon which the code creates the community property presumption.

The right of husband and wife to make contracts is given by section 158 of the Civil Code: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts."

[1-4] The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not be lightly set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. 3 Cal.Jur. Supp. 573. Further, a finding against a presumption is binding upon the appellate court (*Estate of Cronvall*, 220 Cal. 503, 31 P.2d 372), unless the evidence to rebut it is so weak and improbable that the finding is without substantial support. *Olson v. Cornwell*, 134 Cal.App. 419, 25 P.2d 879. It is finally in each case a question of fact for the court or jury to determine whether the evidence is sufficient to overcome the presumption. The rule has been expressed as follows: "If, upon an analysis of evidence of substantial character,

in the light of established rules, the mind of the trial judge, exercising reasonable discrimination, is satisfied that the naked presumption in favor of community property has been outweighed, then the findings of the trial court must prevail." 3 Cal. Jur. Supp. 575, citing *Estate of Tompkins*, 123 Cal.App. 670, 11 P.2d 886. The presumption in favor of community property is disputable and may be controverted by evidence "even by an inference tending to prove the contrary contention". *Estate of Bryant*, 3 Cal.2d 58, 68, 43 P.2d 529, 533.

[5] The conduct of the husband and wife herein throughout the many years of their married life raises the inference that they arrived at an understanding that they would own no community property, but that whatever property was acquired by them in the name of the wife should be her separate property and likewise whatever property was conveyed to the husband and held in his name should constitute his separate property. There is nothing in the record which indicates that they ever held any property in their joint names, although they had many real estate transactions. It is shown that when they acquired the \$20,000 worth of stock in the Mortgage Guarantee Co., one-half was conveyed directly to the wife and the other one-half directly to the husband. This is also true of all of their financial transactions—they each had separate bank accounts, and the wife loaned money to the husband, taking back his note secured by a mortgage on the orange grove which forms part of the estate herein, and which was referred to by appellant as "father's grove". It should also be noted that another orange grove was acquired in the name of appellant so that "each of us would have an orange grove". Appellant testified that she and her husband had no agreement to divide their estates. In the case of *Kaltschmidt v. Weber*, 145 Cal. 596, at page 599, 79 P. 272, at page 274, it was said regarding an understanding between husband and wife that the earnings of the wife should be considered separate property: "Now, it may well have been the case that the husband could recall no conversation between them in which such an agreement was distinctly expressed. His testimony strongly indicates this condition of memory. And yet it might also be true that the fact that there was such an agreement was perfectly well

understood between them. In such a case resort may be had to circumstantial evidence. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, would be competent evidence and admissible to prove the agreement."

The testimony of appellant, notwithstanding her denial of an agreement between her and her husband, is sufficient to outweigh the presumption that decedent's estate was community property; also such testimony, together with the inferences fairly deducible from all the facts and circumstances surrounding the case, is sufficient to support the finding of the trial court that the property of decedent constitutes his separate property.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 715

PEOPLE v. RAMIREZ.
Cr. 3102.

District Court of Appeal, Second District,
Division 2, California.
June 3, 1938.

1. Criminal law ⇐1104(6)

The Court of Appeal has no authority to order a reporter in trial court to prepare transcript of proceedings in that court and furnish a copy thereof to appellant and to Court of Appeal; that authority being vested in the superior court. Rules for the Supreme Court and District Courts of Appeal, § 7, rule 2.

2. Criminal law ⇐1071

Where appellant failed, within 5 days after notice of appeal, to file with clerk and present to trial court application stating grounds of appeal and points upon which he relied, and designating portions of phonographic reporter's notes necessary to be transcribed on appeal, Court of Appeal was without jurisdiction of appeal, and dismiss-

al thereof was required. Rules for the Supreme Court and District Courts of Appeal, § 7, rule 2.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Juan Ramirez was convicted of first degree murder, and he appeals.

Appeal dismissed.

Jesse Bach Porter, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McCOMB, Justice.

There are presented for determination:

(1) A motion by the appellant denominated "Order to Furnish and Certify the Whole Record";

(2) A motion by respondent to dismiss the appeal on the ground that appellant failed to file with the clerk within five days after giving notice of appeal and present to the trial court an application stating in general terms the grounds of the appeal and the points upon which appellant relies, and designating the portions of the phonographic reporter's notes necessary to be transcribed to fairly present the points he desires to urge on appeal as required by section 7, rule II, Rules for the Supreme Court and District Courts of Appeal. 213 Cal. xxxix.

The record discloses that March 10, 1938, appellant gave notice of appeal from a judgment pronouncing him guilty of murder in the first degree and from an order denying his motion for a new trial. No application stating in general terms the grounds of the appeal and the points upon which appellant relies, and designating the portions of the phonographic reporter's notes necessary to be transcribed, was filed until March 16, six days subsequent to the notice of appeal.

These are the questions presented for determination:

First: Does this court have authority to order a reporter in the trial court to prepare a transcript of all of the proceedings in said court and furnish a copy thereof to appellant and us?

Second: Does a failure to file with the clerk and present an application to the

trial court stating in general terms the grounds of the appeal and the points upon which appellant relies, and designating the portions of the phonographic reporter's notes necessary to be transcribed on appeal within the time prescribed in section 7, rule II, supra, i. e., within five days after giving notice of appeal, deprive the appellate court of jurisdiction to hear the appeal?

[1] The first question must be answered in the negative. There is no statutory provision vesting in this court jurisdiction to order a phonographic reporter who has reported the proceedings in a case pending before the superior court to transcribe his notes and furnish a copy either to appellant or to us. This authority is vested in the superior court. Sec. 7, rule II, supra, 213 Cal. xl.

A complete and adequate method of obtaining a proper reporter's transcript is provided in the rules of court above mentioned, and any additional procedure is unnecessary.

[2] The second question must be answered in the affirmative. Compliance with the requirements of section 7, rule II, as above set forth is a jurisdictional prerequisite to the right of appellant to have his case heard by the appellate courts on its merits. The rule is thus stated in *People v. Lewis*, 219 Cal. 410, 414, 27 P.2d 73, 74, by Mr. Justice Seawell:

"Not only must the notice of appeal be filed in time, but a defendant who appeals from a judgment of conviction must, within five days after giving notice of appeal, file with the clerk and present to the trial court an application stating in general terms the grounds of his appeal and the points upon which he relies, and must designate the portions of the reporter's notes necessary to be transcribed. Where the defendant fails to conform with this rule (rule II, § 7, Rules for the Supreme Court and District Courts of Appeal), the appellate court is without jurisdiction to consider his appeal (citing cases)." (Italics ours.)

For the foregoing reasons appellant's motion is denied, and since he has failed to comply with the provisions of section 7, rule II, supra, respondent's motion is granted and the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

**GRUBER v. PACIFIC STATES SAVINGS
& LOAN CO.***

Civ. 10467.

District Court of Appeal, First District,
Division 2, California.

June 8, 1938.

Rehearing Denied July 8, 1938.

Hearing Granted by Supreme Court
August 4, 1938.**1. Trover and conversion** ⇨4

"Conversion" is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

2. Trover and conversion ⇨5

Conversion is a tort, and to establish it there must be a tortious act, although it is unnecessary that there be an actual manual taking of property converted.

3. Trover and conversion ⇨1

Mere words, unaccompanied by any act, cannot constitute a conversion of personal property.

4. Bailment ⇨16

Where plaintiff failed to pay storage charges for keeping his grading equipment in a barn and corral belonging to defendant, the defendant, which maintained watchman on premises, did not convert equipment by thereafter giving plaintiff written notice that he would hold property around the barn as security and would notice it for sale unless payment was made, or by refusing to permit plaintiff to take a plow from corral, in absence of any attempt by plaintiff to remove any property in locked barn, although he had the only key. Civil Code, § 3051.

SPENCE, J., dissenting.

Appeal from Superior Court, Alameda County; Lincoln Church, Judge.

Suit by John K. Gruber against the Pacific States Savings & Loan Company to recover for conversion of personal property. Judgment for plaintiff, and defendant appeals.

Judgment reversed.

John L. Mace, of Los Angeles, and Roy D. Reese, of San Francisco, for appellant.

Milo Ayer and Pierce & Sherwin, all of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for conversion of personal property and had a verdict. The defendant has appealed upon a typewritten transcript. The attack upon the judgment is on the ground that the evidence does not show a conversion as a matter of law. The defendant owned a tract of land upon which it maintained a quarry, a barn, and a corral. The plaintiff had been engaged in the grading business for which purpose he had acquired a stock of equipment.

On April 1, 1932, the parties entered into an oral agreement whereby the defendant let to the plaintiff the barn and corral located on these premises for the storage of plaintiff's plows, harness, and grading equipment, which was then unused because the plaintiff at that time, and for about two years prior thereto, was without work due to the business depression. Some of these articles were placed in the corral, and the remainder was placed in the barn. Similar articles belonging to a third party were also kept in the barn. Sometime after the plaintiff moved his property on the premises he nailed shut the only window and three of the four doors of the barn. On the fourth door he placed a padlock to which he had the only key. The defendant at all times kept a watchman on the premises whose duty it was to see that none of the personal property of either owner was illegally removed. This watchman was the only protection afforded to the property of plaintiff stored in the corral. What, if any, obligation the defendant assumed for the protection of the property under key does not appear.

The charge or rental for this storage was fixed at fifteen dollars a month. Plaintiff made one payment and, on July 25, 1932, the defendant notified him in writing that three months' payments being due it would hold the property "around the barn" as security and would notice the same for sale unless payment was made. Plaintiff called upon an agent of the defendant and told him that he had no money then, but that he would pay the claim as soon as he got work.

Some time later, the record does not fix the date, plaintiff called at the quarry and asked the watchman at the quarry if he might remove a plow from the corral. The watchman replied, "No, I cannot let you have it. When you want any-

thing you go down and see Mr. Hillback." Plaintiff telephoned Mr. Hillback (defendant's agent) who refused to permit him to take the plow from the place.

Sometime in 1933 the defendant sold the real property and the barn and corral were razed by the vendee. Defendant's watchman testified that he and others broke into the barn in 1933 and removed a Keystone grader belonging to the Oakland Paving Co., which had been stored there, and that at that time plaintiff's property was in the barn. Plaintiff testified that he never recovered the property, but admitted that he made no attempt to remove any of the property which he had stored in the barn at any time after the notice was given, that he had no work to do during the period in controversy, and no present use for the equipment because of the business depression. The horse-collars and much of the other equipment was badly worn at the time of storage. He also admitted that he paid none of the storage charges other than the first, and that he visited the premises and saw his property under the care of the watchman after the receipt of the letter above mentioned.

The trial was had upon the theory that this was an action for the conversion of personal property. Viewing the evidence in the light most favorable to plaintiff, we are forced to conclude that plaintiff has failed to prove any conversion of his property.

[1-3] Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. 26 R.C.L. 1098, sec. 3; *Poggi v. Scott*, 167 Cal. 372, 139 P. 815, 51 L.R.A.,N.S., 925; *Byer v. Canadian Bank of Commerce*, 8 Cal.2d 297, 65 P.2d 67; *Aronson v. Bank of America Nat. Trust & Savings Ass'n*, 9 Cal.2d 640, 72 P.2d 548; *Lindsey v. Commercial Discount Co.*, 12 Cal.App.2d 345, 55 P.2d 896; *Vuich v. Smith*, 140 Cal.App. 453, 35 P.2d 365. Conversion is a tort, and to establish it there must be a tortious act. *Home v. Kramer*, 7 Cal.2d 361, 60 P.2d 854; *Steele v. Maricano*, 102 Cal. 666, 36 P. 920. It is not necessary that there be an actual manual taking of the property converted. *Dodge v. Meyer*, 61 Cal. 405, 421. However, mere words, unaccompanied by any act, cannot constitute a conversion. *Herron v. Hughes*, 25 Cal. 555, 559. If these

fundamental rules be applied to the facts of this case, it is apparent that there was no conversion of plaintiff's property. The respondent relies upon the following circumstances as showing conversion, first, the letter of July 25, 1932, and second, the subsequent demand for permission to remove a plow and defendant's refusal to comply with said demand. The property remained at all times either in the corral or locked in the barn, to which plaintiff, at all times, retained the only key. There is no showing that plaintiff was ever refused access to the barn or that he ever attempted to remove any of the equipment stored by him therein. Both before and after the alleged conversion, plaintiff's only activity with respect to his property was to call at the quarry occasionally and inspect the property stored in the corral.

Plaintiff cites and relies upon *Lowe v. Ozmun*, 3 Cal.App. 387, 86 P. 729; *Dodge v. Meyer*, 61 Cal. 405; *McCaffey, etc., Co. v. Bank of America*, 109 Cal.App. 415, 294 P. 45; *Poggi v. Scott*, 167 Cal. 372, 139 P. 815, 51 L.R.A.,N.S., 925; *Vagim v. Haslett Warehouse Co.*, 131 Cal.App. 197, 20 P.2d 992, and *Hull v. Laugharn*, 3 Cal.App.2d 310, 39 P.2d 478. None of these cases are in point. In all of them there was an actual interference with the plaintiff's ownership, either by an actual taking of the goods, or by dealing with a negotiable bill of lading representing the goods, or by the unlawful use of legal process to obtain possession of the goods. As the facts above stated clearly demonstrate, defendant in this case did not interfere with either plaintiff's possession of the goods or with plaintiff's ownership of the goods.

[4] Our preliminary examination of the case satisfied us that there was no evidence of a conversion as that term is defined in authorities here cited. The submission was set aside, and the parties were asked to argue this point and particularly whether the relation was not that of bailor and bailee. Additional briefs were filed and the matter was thereafter argued orally. This relation stands admitted on the record. Throughout the trial plaintiff and his counsel contended that the barn and corral were rented for "storage purposes". The undisputed evidence shows that that was the sole purpose of the contract, and that the plaintiff did not use the premises for any

other purpose. The plaintiff testified that, when the contract was made, the defendant assured him that it maintained a watchman on the premises who would keep watch over his property. He testified that he visited the premises on many occasions and always saw the watchman there. He had not used this equipment for nearly two years before he moved it on to these premises. The defendant remained in sole and exclusive possession of all the property upon which the barn and corral were located, and the plaintiff at no time assumed any right of occupancy or possession of any portion of the property, other than the right to store his equipment as above stated.

The case is parallel to that where a garage keeper agrees to store a car of a customer at a monthly rate, and to permit the owner to take the car out and return it at his will. It has been held that, in the absence of statute, the keeper has no lien for storage charges. 6 Am. Jur., secs. 274, 278. But section 3051 of our Civil Code provides that "Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the * * * safekeeping, * * * thereof, has a special lien thereon, dependent on possession, for the compensation * * * for such service." The conceded facts are that the defendant employed the watchman for the protection and "safekeeping" of the personal property stored by plaintiff and another on the premises. Throughout his brief the plaintiff has insisted that, notwithstanding his possession of a key to the barn, the defendant had actual and exclusive possession of the property. He testified at the trial that he took the premises solely for the purpose of storing his equipment. He made no use of the realty, other than the barn and corral for the purpose of storage. The watchman employed by the defendant gave the only protection and supervision given to his property while stored there. He insists that this put the defendant in legal and exclusive possession. The plow, which was stored in the corral, was the only piece of the entire equipment which the plaintiff sought to remove. It is conceded that defendant had exclusive possession over that portion of the equipment. Since the claim of lien was made upon the property "around the barn" it covered the property stored in the corral. For the

reasons given there is no evidence of conversion of any portion of plaintiff's property. If plaintiff had a cause of action for some liability arising after the claim of lien, he has failed to prove it.

Since the above disposes of the appeal, it is unnecessary to pass upon the merits of the other points raised by defendant.

The judgment is reversed.

I concur: STURTEVANT, J.

SPENCE, Justice.

I dissent. This cause was tried upon the theory that the relationship established between the parties by their agreement was solely that of landlord and tenant. Such relationship was alleged in the amended complaint and was expressly admitted by the answer. The jury was instructed only upon this theory and no exception has been taken to any instruction given by the trial court. Appellant filed its opening and reply briefs on this appeal and at all times conceded that this was the only relationship created by the agreement. It claimed "this tenancy was never terminated". It was never suggested in the trial court or in the briefs that the agreement constituted a deposit for hire resulting in the establishment of the relationship of bailor and bailee. Nor was it ever suggested that appellant, by virtue of the agreement, took possession of the equipment and was entitled to a lien "dependent on possession" for any service rendered while "lawfully in possession" as provided in section 3051 of the Civil Code.

The issue between the parties was whether appellant had converted the equipment by the acts shown by the evidence, it being agreed by all parties that respondent was in possession of the equipment at all times prior to the alleged conversion. Appellant did not defend upon the ground that it previously had possession as bailee and was entitled to retain the same to satisfy a lien. On the contrary, it admitted that its written threat to sell the equipment "on account of unpaid rental" was unwarranted and constituted a "threat to convert" said equipment, but it insisted that there was no actual conversion. It argued that this was true "because access to and control over the property at all times remained not in appellant but in respondent". It further argued that the evidence failed

"to establish any shadow of possession of the chattels in appellant at any time".

With the issue thus defined, the cause was argued and submitted on appeal. This court was divided on the question of whether the acts of appellant constituted a conversion. The submission was set aside and it was suggested by the majority members of the court that argument was desired on the question of whether the evidence was sufficient to show "that the contract between the parties was one of storage for hire". Further briefs were filed in which appellant stated: "This proposition is inconsistent with the argument heretofore advanced by the appellant to the effect that appellant had no possession or control over the respondent's goods, and therefore that the threats to convert did not in law amount to a conversion." Appellant nevertheless argued the cause in line with the suggestion but expressly stated that "appellant does not relinquish its position set forth in the briefs heretofore filed, which assumes the existence of the relationship of landlord and tenant. * * *

The majority opinion proceeds upon the theory the parties entered into an agreement for storage for hire rather than an agreement for the rental of a portion of the real property. In other words, the theory is that the relationship of bailor and bailee was established rather than the relationship of landlord and tenant. The result of the majority opinion is to reverse the judgment of the trial court upon a theory never suggested to the trial court and upon a theory which, in my opinion, finds no support either in the pleadings or the evidence.

I cannot agree with the majority opinion where it says that the relationship of bailor and bailee "stands admitted on the record". It is the relationship of landlord and tenant which stands admitted. I believe that the confusion results from the failure to distinguish between (1) an agreement for storage for hire which establishes the relationship of bailor and bailee and (2) an agreement for the rental of real property which establishes the relationship of landlord and tenant even though it may be contemplated that the property will be used by the tenant solely for storage purposes. The facts here are not analogous, as suggested in the majority opinion, to those in the ordinary case of a garage keeper who enters into the ordinary agreement for the stor-

age of a customer's automobile at a monthly rate. The facts before us are analogous to those in the ordinary case of a landlord who enters into the ordinary agreement in the rental of a private garage to a tenant at a monthly rental, it being contemplated that such garage will be used by the tenant for the purpose of storing his automobile. In the latter case the relationship of landlord and tenant is established, the tenant retains possession of the automobile at all times and the landlord acquires no lien for his rent. In the former case, the relationship of bailor and bailee is established, the garage keeper is given possession of the automobile for the purpose of safekeeping, and he acquires a lien "dependent on possession" for services rendered "while lawfully in possession". Civ.Code, § 3051. Where, as in the present case, it is admitted by the pleadings and otherwise that the relationship of landlord and tenant was the sole relationship established by the agreement of the parties, the mere fact that it was contemplated that the tenant would use the property solely for "storage purposes" is wholly immaterial. Such evidence could only be material in the event that the relationship established was in dispute and an issue was made by the pleadings with respect thereto.

The majority opinion construes the threat to sell the equipment as covering only the equipment in the corral. This construction does not appear to be justified and it is contrary to appellant's construction of its own letter. Appellant concedes that it "notified plaintiff by letter that unless the delinquent rental were paid on July 27, 1932, all personal property owned by plaintiff, located in the demised premises, would be advertised and sold to satisfy the rental charges then due".

The majority opinion further lays stress upon the fact that there was a watchman in the employ of appellant. This fact does not appear significant as the evidence merely shows that respondent was informed that appellant had a watchman who "was coming there and watching and taking care of the whole place", of which place respondent rented but a part. But in any event, the relationship established by the agreement was not in issue. It was admittedly that of landlord and tenant. When said opinion states that respondent has insisted throughout his brief that appellant "had actual and

exclusive possession of the property", said opinion can only refer to the time after the alleged conversion of the property. Respondent has at all times insisted that the equipment was in his own possession until converted by appellant, and that such conversion consisted of the wrongful interference by appellant with respondent's possession by the wrongful assumption of dominion over the equipment and the refusals to permit respondent to remove the same. On the other hand, appellant has insisted that it never had the equipment in its possession at any time for safekeeping or otherwise.

There were but two points raised by appellant on this appeal. It first contended that while the uncontradicted evidence showed a threat to convert, the evidence was insufficient to sustain the implied finding that appellant was guilty of conversion. In my opinion, this contention is without merit.

The evidence was sufficient to show not only the written threat of appellant to convert the property, but also to show the refusals of appellant's agents, including the watchman and Mr. Hillback, in the immediate proximity of the equipment and elsewhere, to permit respondent to remove the equipment from the premises. These refusals were in line with appellant's statements in its written threat wherein respondent was informed that "the only way in which you can have your equipment released is by the payment of your rental in full". I believe this evidence was sufficient to show a conversion and to sustain the judgment.

The rule is stated in 2 Tiffany, Landlord and Tenant, page 1673, as follows: "The landlord is, it has been held, guilty of conversion if he refuses to allow the tenant to remove his goods during the tenancy, or at a subsequent time when the latter has a legal right to do so."

* * *

While there appears to be no authority directly in point in this jurisdiction, the language of the authorities clearly indicates that respondent was entitled to recover. *Poggi v. Scott*, 167 Cal. 372, 139 P. 815, 51 L.R.A., N.S., 925; *Dodge v. Meyer*, 61 Cal. 405, 420; *Hull v. Laugharn*, 3 Cal.App.2d 310, 314, 39 P.2d 478; *McCaffey Canning Co. v. Bank of America*, 109 Cal.App. 415, 424, 294 P. 45; *Lowe v. Ozmun*, 3 Cal.App. 387, 86 P.

729; *Vilas v. Mason*, 25 Wis. 310; *Debobs v. Butterly*, 210 App.Div. 50, 205 N.Y.S. 104; *Smith v. Boyle*, 66 Neb. 823, 92 N.W. 1018, 103 Am.St.Rep. 745; *Watts v. Lehman*, 107 Pa. 106; *Morris v. Pratt*, 114 La. 98, 38 So. 70; 65 Cor. Jur., p. 30, sec. 37.

Appellant also contended that the verdict was excessive, but there was ample evidence relating to value to sustain the verdict in the amount awarded.

I am therefore of the opinion that the judgment should be affirmed.



27 Cal.App.2d 65

LEMA et al. v. FERRARI et al.

Civ. 5922.

District Court of Appeal, Third District,
California.

June 8, 1938.

1. Waters and water courses ⇨107(3)

A complaint alleging that plaintiffs were the owners and entitled to the possession of the entire natural flow of water from a spring and reservoir located on defendants' lands, that the defendants had no title to the water, and that they interfered with plaintiffs' title and use thereof by wrongfully diverting the water, sufficiently raised an issue as to the ownership of the water from the spring and the right to an easement over defendants' land for the use and enjoyment of the easement, and stated a good cause of action for injunctive relief against defendants' alleged interference with such right.

2. Waters and water courses ⇨107(3)

Plaintiffs suing to restrain defendants from interfering with plaintiffs' easement in and to the use and enjoyment of the benefits of waters from a spring situated on defendants' land need not affirmatively allege that the water was necessary for purposes beneficial to the plaintiffs.

3. Waters and water courses ⇨107(3)

Plaintiffs suing to restrain defendants from interfering with plaintiffs' easement to the use of water from a spring situated on defendants' land need not affirmatively

prove that all the water which they obtained from the spring was used for beneficial purposes, since the question as to what quantity of water belonged either to the plaintiffs or the defendants was not an issue in the case.

4. Waters and water courses Ⓒ151

Prescriptive rights to water can be lost only by abandonment, forfeiture, or by operation of law.

5. Waters and water courses Ⓒ107(3)

Defendants seeking to defeat plaintiffs' rights to waters of spring by abandonment, nonuser, or otherwise, had burden of showing such loss of rights where plaintiffs made a prima facie showing of title to waters in spring in their suit to restrain the defendants from interfering with their easement in and to the use of the water.

6. Waters and water courses Ⓒ107(3)

In action to restrain defendants from interfering with plaintiffs' easement in and to the use and enjoyment of the benefits of waters from a spring situated on defendants' land, the failure of judgment in favor of plaintiffs to specifically fix the amount of water to which the plaintiffs were entitled was not reversible error.

7. Waters and water courses Ⓒ107(3)

In action to restrain defendants from interfering with plaintiffs' easement in and to the use and enjoyment of the benefits of water from a spring situated on defendants' land, the burden of proving that there was an excess of water over and above the reasonable requirements of the plaintiffs to which the defendants were entitled was on the defendants.

Appeal from Superior Court, Amador County; Roy B. Maxey, Judge.

Action by Joseph Lema, Ida A. Lema, his wife, and another, against Lewis C. Ferrari and others, for injunctive relief to restrain the defendants from interfering with plaintiffs' easement in and to the use and enjoyment of the benefits of the water for irrigation and domestic purposes from a certain spring situated on the land of the defendants. The defendants filed a cross-complaint. From the judgment, the defendants appeal.

Affirmed.

Snyder & Snyder, of Jackson, for appellants.

A. L. Martin and T. G. Negrich, both of Jackson, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an action for injunctive relief to restrain the defendants from interfering with plaintiffs' easement in and to the use and enjoyment of the benefits of the water for irrigation and domestic purposes from a certain spring which is situated on the land of defendants.

Joseph and Ida A. Lema are husband and wife. Joseph is the son of the plaintiff, Lucy Lema. The complaint alleges that for thirty-five years the plaintiff, Lucy Lema, has been and now is the owner of a ten-acre tract of land in Amador county, which is specifically described; that the plaintiffs, Joseph and Ida A. Lema, for a similar length of time have been, and now are the owners of an adjoining tract of land which is also described, and that defendants are owners of a large tract of land adjoining the plaintiffs' said lands on the north and west thereof; that upon a part of defendants' land, which was acquired from Mary Elizabeth Hageman, there is located a certain spring called the Murphy spring or Murphy reservoir; that the plaintiffs, Joseph and Ida A. Lema, are the owners and entitled to one-half of the flow of water from the Murphy spring; that the plaintiff, Lucy Lema, is the owner and entitled to the other half of the flow of water from that spring; that the defendants have no right or title to that spring, but that they have diverted the water from the spring and permit their cattle to stray upon the field where the spring is located and consume the water therefrom and otherwise interfere with plaintiffs' ownership and use of the water of the spring, and that plaintiffs threaten to continue to use the water and interfere with plaintiffs' use thereof.

The defendants filed an answer and cross-complaint denying that plaintiffs or either of them own any part of the water of the Murphy spring, or that they are entitled to the use thereof, and, upon the contrary, that defendants own the spring and are entitled to the use of the water thereof, and that they have permitted their stock to drink from the spring and intend to continue to do so, and pray that the court decree that plaintiffs take nothing by their action.

Upon trial of the cause the record and judgment in a former suit involving the ownership and right to the water from the Murphy spring were received in evidence. That judgment was rendered in Amador county in 1900. It was determined in that suit which was entitled Jennie A. Murphy, Plaintiff v. Mary Elizabeth Hageman, John C. Lema and Lucy Lema, his Wife, Defendants, that:

"Jennie A. Murphy is entitled to one-half the natural flow of the spring and reservoir * * * taken from a point of diversion at said reservoir through the ditch and flume commonly called the Jennie Murphy Ditch, conveying water from said spring and reservoir through the land of the defendants * * * to the land of plaintiff hereinafter described, the same to flow uninterruptedly through said ditch and flumes, and being the natural flow of said spring and reservoir at the same point of diversion and at the same level in said reservoir as at the date of the commencement of this action."

The decree in that action further determines that:

"John C. Lema and Lucy Lema, his wife, are entitled to the use upon that portion of their lands hereinafter described which lies below said ditch and constitutes their garden, for household, domestic and irrigating purposes, of one-half of the natural flow of said spring and reservoir at the same point of diversion and at the same level in said reservoir as at the date of the commencement of this action, the same to be used through the said Jennie Murphy ditch and flumes and by means of the irrigating reservoir situated back of the dwelling house of said defendants Lema, upon their said garden, and when the said one-half of said natural flow is not being used by them it shall be turned back in said ditch and be permitted to flow therein down to and upon the lands of the plaintiff, together with the other one-half of said flow hereinabove decreed to belong to plaintiff."

That decree also provides:

"Mary Elizabeth Hageman claims no right of ownership in said spring or natural flow therefrom or said ditch, but does claim and is entitled to have the cattle belonging to her when upon the land upon which the same is situated drink therefrom, and the said right to have said cattle drink from said spring is hereby con-

firmed to said defendant Mary Elizabeth Hageman."

At the trial of the present action, a deed of conveyance of the land to which the above-mentioned one-half interest in the water from the Murphy spring is appurtenant, was received in evidence, from Jennie A. Murphy to Joseph and Ida Lema, dated March 18, 1916. For a valuable consideration that deed conveyed to the plaintiffs in this suit, Joseph and Ida A. Lema, not only the land but also the water rights vested in Jennie A. Murphy by the decree which was formerly rendered in 1900. The language of the deed conveying the water rights is as follows:

"Also one-half of the natural flow of the spring and reservoir commonly called the Murphy reservoir, hereinafter described, taken from a point of diversion at said reservoir, through a ditch and flume commonly called the Jennie Murphy ditch, conveying water from said spring and reservoir through the lands of one Lema to the lands above described; also all the right, title and interest of the parties of the first part, in and to said spring and reservoir and said ditch and flume known as the Jennie Murphy ditch. The said spring and reservoir is situated upon that piece or parcel of land" (here follows a description of the land upon which the spring is located).

It will be observed the decree of court in the previous action awarded one-half of the water of the spring to John C. and Lucy Lema, husband and wife, to which one-half interest the wife succeeded and is now the owner, and that the remaining one-half interest which was awarded to Jennie A. Murphy in that same suit was conveyed by the deed of March 18, 1916, to Joseph and Ida A. Lema. The plaintiffs in the present action, therefore, own the entire flow of water from that spring, together with the easement of maintaining and conducting it to their lands by means of the ditch referred to, subject only to the right of Mary Elizabeth Hageman or her successor in title to water their cattle at that spring, according to the reservation therefor contained in the former decree of court. We assume, although we are directed to no evidence to that effect, that the defendants in this case succeeded to the title of Mary Elizabeth Hageman in the land upon which the spring is located. But there is no evidence that any reservation

of right or title to the water of the spring was ever conveyed to the defendants in this action.

The evidence in this case shows without contradiction that Mrs. Hageman never owned or watered more than twelve head of cattle at that spring. It satisfactorily appears that the plaintiffs constantly used the water from that spring. Joseph Lema testified in that regard:

"Q. Does that spring run in what we call a 'dry year', Mr. Lema? A. We always have had water—about the only year we didn't have much water was in 1913. * * * That was only about two weeks, we had the water down there—always have water inside the fence."

It appears the plaintiffs constructed and maintained on the property of Lucy Lema a reservoir in which they impounded and held the water which flowed through the Murphy ditch from the spring, to economize and conserve the water for necessary domestic use. The evidence is undisputed that the said water rights were regularly assessed and taxed as appurtenances to the lands of the respective plaintiffs in this action, and that they have always paid those taxes.

The evidence also shows that the defendants in this suit, for about three years, kept a herd of at least 125 head of cattle which were permitted to and did interfere with plaintiffs' right, title and use of the water from the spring by straying in and about the ditch which conveys the water from the spring, trampling down the banks thereof, polluting the water therein and obstructing its flow, to the great detriment of plaintiffs, and that the plaintiffs were thereby compelled to repair and clear the ditch of obstructions every few days.

The court adopted findings in this case to the effect that the plaintiffs for more than thirty-five years last past have been and now are the owners and entitled to the use of the water from the Murphy spring and reservoir situated on the property of the defendants, which is particularly described; that the defendants have no right to interfere with plaintiffs' use of the waters of that spring; that the defendants have diverted the water and interfered with plaintiffs' use thereof, and have threatened to continue to do so, and that the plaintiffs are entitled to an injunction restraining the defendants from continuing to interfere with their said water rights.

A decree was thereupon rendered in which it was determined that the plaintiffs are entitled to the use of all the natural flow of the water from the Murphy spring and reservoir, "for household, domestic and irrigation purposes taken from a point of diversion at said reservoir by reasonable means of diversion, and in such quantity as is reasonably necessary for the purposes aforesaid". The defendants were thereupon restrained from interfering with plaintiffs' said use of the water.

The appellants contend that the complaint fails to allege facts sufficient to warrant injunctive relief; that the evidence does not support the findings and decree establishing ownership of any part of the water in plaintiffs for the reason that it fails to show a beneficial use thereof; that the evidence fails to prove interference with the plaintiffs' use of the water on the part of the defendants, and that the evidence fails to show irreparable injury to plaintiffs' use of the water warranting the issuance of an injunction.

[1] The allegations of the complaint to the effect that the plaintiffs are the owners and entitled to the possession of the entire natural flow of water from the spring and reservoir commonly called the Murphy spring, which is located on land described in the pleadings, together with averments that the defendants had no title thereto and that they interfered with plaintiffs' title and use thereof by wrongfully diverting it, sufficiently raises the issue as to the ownership of the water from the spring and the right to an easement over defendants' land for the use and enjoyment thereof. The complaint states a good cause of action for injunctive relief against alleged interference therewith. In 67 Corpus Juris, page 1057, section 519, it is said:

"Where it appears from the pleadings that each party claims the right to take all the water of a particular stream, the pleadings cannot be construed as presenting a suit to ascertain and declare the respective rights and priorities of the parties in the use of the water."

[2] It was not necessary to affirmatively allege that the water was necessary for purposes beneficial to the plaintiffs. *Cheda v. Bodkin*, 173 Cal. 7, 158 P. 1025; 9 Cal. Jur. 963, sec. 14. This is not a suit for the apportionment of water. In the authority last cited it is said:

"In an action based upon the ownership of an easement, an allegation that the

plaintiff is the owner of a described right of way or other easement over defendant's land and that such easement is appurtenant to plaintiff's land, is a sufficient statement of the ultimate facts to be established, and *such an allegation may be sustained by proof of title acquired in any legal mode, whether by grant or by prescription.*"

Similar allegations in the Cheda Case, supra, with relation to an asserted claim of easement for the use of water derived from defendant's land, were held to be sufficient, even against a demurrer which was filed in that case. In the present case there was no demurrer presented. Moreover, the answer affirmatively raises the identical question with relation to the ownership of the water of the Murphy spring, by denying plaintiffs' title thereto and by asserting that it belongs absolutely to the defendants. The only issue in the case was whether plaintiffs had a right to the waters of that spring, and to an injunction against interference therewith. The spring is located on the land of defendants. Plaintiffs acquired one-half interest in the water of that spring by virtue of a judgment which was previously rendered in another suit with relation thereto. The remaining one-half interest was acquired by deed from the owner thereof. The title and use of the water is appurtenant to the lands of the plaintiffs, and became an easement incident to the lands of defendants for that purpose. We are of the opinion the allegations of the complaint are sufficient in that regard.

[3-5] It was not necessary for the plaintiffs in this case to affirmatively prove that all of the water which they obtained from the spring was used for beneficial purposes. The question as to *what quantity* of water belongs either to the plaintiffs or to the defendants was not an issue in the case. The real question at issue was whether the defendants interfered with plaintiffs' right to take the water by permitting their stock to trample down the banks and obstruct the flow of the water in the ditch. The decree which was rendered in this case does not prohibit the defendants from watering their stock at the spring. It merely enjoins them from interfering with the right of the plaintiffs to take and use water in the manner authorized by the former judgment and deed of conveyance. Plaintiffs made a prima facie showing of title to the water based upon the former judgment and deed, to-

gether with some evidence of continuous use. Assuming that the rights of the plaintiffs to the water are based upon prescriptive rights formerly acquired, those rights could be lost only by abandonment, forfeiture or by operation of law. If the defendants sought to defeat plaintiffs' rights by abandonment, nonuser, or otherwise, in view of the prima facie showing of title on the part of the plaintiffs, the burden was on the defendants to show such loss of rights. No evidence was adduced in support of any such contention. In 67 Corpus Juris, page 959, section 408, it is said in that regard:

"Prescriptive rights once acquired cannot be taken from or lost by those acquiring them except by their voluntary acts, by forfeiture, or by operation of law; they are subject to be lost only as similar property might be, had title thereto been acquired by deed. Such a right, acquired by user, may be lost by disuser, the discontinuance of the use for a long period affording a presumption of the extinguishment of the right."

And it is further said at page 1061 of the authority, section 526:

"A party who bases his right on prescription or adverse possession, or *on the abandonment or forfeiture of prior rights, has the burden of proof as to such matters.*"

[6] We are of the opinion there is no merit in the contention that the judgment should be reversed because the court failed to specifically fix the amount of water to which the plaintiffs are entitled. In the case of McAlister v. Dungan, 108 Cal.App. 185, 189, 291 P. 419, 421, a similar contention that the judgment should be reversed for failure to fix the amount of water to which the defendants in that case were entitled was disposed of in this language:

"The only other point urged for a reversal is that the court failed 'to fix or establish the amount of water which defendants were entitled to take from their said spring.' But this is not an action for the division of the water of the spring. The judgment in this action, as well as that in the former action, gives the defendants the right to the use of all the water of the spring. While the flow of water from the spring is variable, the judgment is fixed and certain."

[7] As we have previously said, this is not a suit for partition or allotment of

water of a spring as between the respective parties. It is merely a suit for injunction to restrain the defendants from interfering with plaintiffs' use of the water. We assume from the language of the findings and judgment that the court affirmed the plaintiffs' right, derived from the former judgment and deed of conveyance, to all of the water from the spring and said reservoir, taken by means of the ditch, which is reasonably necessary for their use for "household, domestic and irrigation purposes" on their respective lands, and that any water therefrom in excess of those needs of the plaintiffs may be used by the defendants. If there be an excess of water over and above the reasonable requirements of the plaintiffs, to which the defendants are entitled, we are of the opinion the burden was on the defendants to show that fact in defense of this action to enjoin them from interfering with plaintiffs' rights by permitting their cattle to divert water by trampling down the banks and obstructing the flow of water in the ditch. The judgment might have been more specific in enumerating the acts of infringement which are thereby prohibited. We are of the opinion, however, that the judgment is adequate enough for the purposes of this proceeding.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



27 Cal.App.2d 17

SCOVILLE et al. v. KEGLOR et al. *
Civ. 2043.

District Court of Appeal, Fourth District,
California.

June 6, 1938.

Hearing Denied by Supreme Court
August 4, 1938.

1. Judgment ⇨273(1)

The trial court, by taking proper course for doing so, may make its findings and enter its judgment nunc pro tunc as of date on which verbal decision has been rendered and minutes thereof entered stating aggregate amount of award.

2. Appeal and error ⇨969

Whether plaintiffs' counsel were dilatory in time taken in preparing findings was

matter which was to be decided by trial court, and reviewing court would only be called upon to review an abuse of trial court's discretion.

3. Judgment ⇨273(5)

Where one of plaintiffs died subsequent to rendition of verbal decision by court, the court erroneously undertook to file its findings of fact and conclusions of law and to enter its judgment nunc pro tunc as of date of verbal decision without making order of substitution of the administratrix for the deceased plaintiff, since prior to substitution of administratrix there was, as to deceased plaintiff's interest, no plaintiff before the court.

4. Husband and wife ⇨260

General damages for personal injuries to either spouse, and damages for loss of time and impairment of husband's earning capacity, are community property. Civil Code, § 161a.

5. Husband and wife ⇨260

Damages for expenses incurred by either spouse in treatment of their injuries were to be considered community property, in absence of allegations that separate estate of one was in some manner especially obligated for their payment. Civil Code, § 161a.

6. Appeal and error ⇨1073(3)

A judgment in solido in favor of two parties plaintiff is not necessarily prejudicial to a defendant.

7. Judgment ⇨273(5)

Where nunc pro tunc judgment entered in personal injury action by husband and wife as of date prior to husband's death was void as to husband because his administratrix had not been substituted for him as a party plaintiff, combining that judgment in solido with judgment otherwise good in favor of wife as to separate property of hers was erroneous. Civil Code, § 161a.

8. Automobiles ⇨245(17)

Where vehicle is so disabled that it is physically impossible to move it, leaving it upon main traveled portion of highway until it is reasonably practicable to remove it is not negligence as a matter of law. St. 1931, p. 2128, § 136(a).

9. Automobiles ⇨245(17)

Whether occasion for stopping vehicle upon main traveled portion of highway was sufficiently imperative to bring driver with-

*For subsequent opinion see 84 P.2d 212.

in exception to statute prohibiting obstruction of highway by a standing vehicle is ordinarily a question not of law, but of fact. St.1931, p. 2128, § 136(a).

10. Automobiles ⇨242(1), 244(14)

One parking automobile upon traveled part of highway is prima facie a violator of law and has burden of showing affirmatively that it was necessary for him to so park, and a party injured in collision under such circumstances does not have duty of showing that such parking was not necessary. St.1931, p. 2128, § 136(a).

11. Appeal and error ⇨1008(1)

In action for injuries sustained by passengers in automobile which collided at night with rear of unlighted truck which blocked a portion of the traveled part of highway, whether truck driver was negligent in parking truck upon highway and whether he used reasonable care in notifying public of presence of truck *held* for trier of facts. St.1931, p. 2128, § 136(a).

12. Appeal and error ⇨1008(1)

In action for injuries sustained by passengers in automobile which collided at night with rear of unlighted truck parked on traveled portion of highway, whether driver of automobile was contributorily negligent in not slowing down when partially blinded by an approaching automobile shortly before collision *held* for trier of facts. St.1931, p. 2128, § 136(a).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Margaret W. Scoville, as administratrix of the estate of J. M. Scoville, deceased, and another, against Ervin Keglör and others, copartners doing business under the firm name and style of Universal Interstate Freight Company and others to recover damages for injuries sustained in a collision between an automobile and a truck. Judgment for plaintiffs, and defendants appeal.

Reversed and remanded, with instructions.

Lasher B. Gallagher, of Los Angeles, and Hickcox & Trude, of El Centro, for appellants.

Harry W. Horton, of El Centro, for respondents.

HAINES, Justice pro tem.

At 3 o'clock, or thereabouts, in the morning of May 3, 1934, defendant and appellant Keglör had been driving a Chevrolet truck and trailer in a westerly direction on the 20-foot-wide state highway from Yuma toward Holtville, in Imperial county, through the desert. The truck and trailer belonged to defendant and appellant Hamilton, who had, however, leased them to defendant and appellant Universal Interstate Freight Lines, a corporation, and they were being used to transport a cargo of cotton as a part of the corporation's business, but under the direction and control of Hamilton who accompanied the truck. The body of the trailer was eight feet wide and between the outer edges of the dual tires at its rear the distance was eight feet five inches. Keglör was Hamilton's employee. Hamilton had personally driven the truck that night from Phoenix to Yuma and then turned the driving over to Keglör and himself lain down on the cargo and gone to sleep. Trouble having developed with the lights, Keglör stopped on the right side of the highway, and while the truck was stationary and unlighted, or its lights too dim to be seen, J. M. Scoville, originally one of the plaintiffs in the present action, together with plaintiff and respondent Margaret W. Scoville, his wife, and three other passengers, also proceeding westerly on the highway in a Dodge car driven by Mr. Scoville but owned by his wife, collided with the trailer, then entirely unlighted, by striking it in the rear, with resulting injuries to both of the Scovilles as well as to the Dodge car.

The present action is one originally brought by the Scovilles in which they sought to recover from the appellants damages for the injuries so sustained. The damages asked were, in detail, on account of the personal injuries to Mr. Scoville, \$25,000 general damages; \$5,000 for loss of time and impairment of his ability to earn a livelihood; \$10,000 for expenses of treatment incurred and to be incurred; on account of the personal injuries to Mrs. Scoville, \$5,000 general damages, plus \$5,000 more for nervous shock and medical expenses, which latter two items are grouped together; and also \$1,000 for injury to the Dodge car. After answer filed by appellants the case was brought to trial before the court.

The testimony of appellant Keglör, the truck driver, was to the effect that the bat-

tery supplying his lights had appeared to be in good condition and until immediately before the accident no trouble with the lights had been experienced; but that on the road from Yuma toward Holtville he had gotten a short distance beyond a station known as Grey's Wells when his lights suddenly began to dim; that after beginning to notice this he went on about 200 feet and then stopped; that by that time the lights were so far gone that there was practically no reflected light on the road ahead of him; that, upon stopping, he picked up a flashlight that he had with him in the cab, got out and noticed respondents' automobile approaching from about 300 feet to the rear (east); that he stood out near the white streak in the middle of the highway abreast the front of his truck for about five seconds swinging his flashlight back and forth and then dodged in front of his truck to avoid respondents' oncoming automobile. He said that there were flares in his toolbox between the truck and the trailer. The box was closed and he made no attempt to get them out. To have used them it would have been necessary to get them out, light them and set them in the highway back of the trailer.

Appellant Hamilton testified that the battery above referred to was only about four months old and in good condition; that its hydrometer reading was from time to time checked; also that after the collision he found that the truck was as near to its right side of the paved highway as it was practicable to drive it. The evidence is that the highway was covered with a new pavement of black material; that it is impracticable to drive a truck off it on either side because the surface of the surrounding country is desert sand, from which it is not practicable to pull back to and upon the highway. It is not claimed that there was any other obstacle to the truck's proceeding at the time it stopped than the circumstance that its lights had given out.

Mr. Scoville testified that he had driven the Dodge car from Tucson; that it was in excellent condition and had perfect brakes; that its lights had been adjusted the day before leaving Tucson and were burning at the time of the collision; that there was nothing ahead to blind him and his headlights would enable him to see an object as large as a human being a hundred yards ahead of his car. There were three people in the back seat of his car, Mrs. Scoville and two gentlemen. A Mrs. Villaescusa, wife of one of these gentlemen

was sitting at the witness' right on the front seat. Scoville went on: "We were driving along about 35 miles an hour. I saw a car coming towards us, as I remember it, probably 100 or 150 yards ahead, and I slowed up a little bit. The next thing I knew we hit something * * *". Proceeding, he testified further that he had his eyes ahead on the road and saw nothing of the truck and trailer until the collision. It was still dark. According to Scoville he could have stopped his car within twenty feet or less. He was not blinded by the lights of the car which was approaching from the west so as to be unable to see at all. He had reached a place probably ten or fifteen yards from the point of impact with the trailer when the headlights of the approaching auto had a material effect on his ability to see ahead.

Mrs. Scoville and Mr. and Mrs. Villaescusa all testified at the trial. Their testimony is in general in line with Mr. Scoville's. All say that they were awake when the accident occurred. Mr. Villaescusa agrees that the Dodge car was going at about 35 miles an hour, and corroborates Scoville's statement that they were passed by a car going east prior to the collision. All of these witnesses agree that they saw no flashlight signal such as Keglör claims to have given. The testimony appears to be that the trailer was of a whitish color blending easily with the color of the desert landscape. The night was a clear one.

We shall not take the space to detail the evidence with respect to the injuries sustained or other elements of damage claimed as no point is made that the awards are excessive.

After the conclusion of the evidence the court entered on December 1, 1936, a minute as follows:

"The above entitled cause having heretofore been tried before this court and taken under submission thereby at this day the court grants judgment to the plaintiffs in the amount of \$4997.00, together with costs of suit."

On December 17, 1936, J. M. Scoville died. Thereafter, on April 16, 1937, the court made an order reciting the fact that his death had been suggested to it and directing that its findings and judgment be made nunc pro tunc as of December 1, 1936. Findings, dated as of that date, were on April 16, 1937, filed accordingly, and a judgment also dated as of December 1, 1936, purporting to run in favor of both

the original plaintiffs was entered on April 17, 1937. From this judgment the present appeal was taken on April 20, 1937.

A week later, that is on April 27, 1937, the trial court made an order undertaking to substitute for the decedent, as a party plaintiff, the said Margaret W. Scoville, who had meanwhile been appointed administratrix of his estate in her capacity as such administratrix. On May 10, 1938, she was as such administratrix substituted for him by this court as a respondent.

On appellants' behalf it is now urged (a) that the trial court was without authority to make its findings and enter its judgment nunc pro tunc and that the action as to J. M. Scoville abated with his death; (b) that the court erred in failing to find upon material issues; (c) that the findings did not support the judgment; (d) that no negligence on appellants' part was shown; and (e) that the decedent, J. M. Scoville, was himself guilty as a matter of law of negligence that proximately contributed to his injuries.

[1] That the court, had it taken the proper course for doing so, had the authority to make its findings and enter its judgment nunc pro tunc as of December 1, 1936, we have no doubt. The principles governing such action have been elaborately discussed in *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 P. 328, *Leavitt v. Gibson*, 3 Cal.2d 90, 43 P.2d 1091, and *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P.2d 952. As is said in *Fox v. Hale & Norcross S. M. Co.*, supra, page 480, 41 P. page 329:

"One class of the cases in which this authority may be exercised, says Mr. Freeman, comprises those 'actions in which no judgments have ever been rendered, but which are, so far as the suitors can make them, in condition for the rendition of final judgments'."

Here, though no findings had yet been filed at the time of Scoville's death, the court had verbally rendered its decision, and a minute thereof had been entered in which there was stated the aggregate amount of the award. As was further said in *Fox v. Hale & Norcross S. M. Co.*, supra, pages 481, 482, 41 P. page 329:

"If, as is provided by sections 632 and 633, Code Civ.Proc., the making and filing of findings of fact is essential to its decision, the court has the same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. * * * The decision

which the parties have invoked the court to make is not necessarily the statutory and technical 'decision' referred to in section 633, Code Civ.Proc., but is the final determination of the rights of the parties, and includes every step or act of the court which is requisite to a final judgment upon their rights. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve these rights."

In *Leavitt v. Gibson*, supra, the case had been fully tried, the evidence concluded, and an order been made allowing the plaintiffs certain time to file an opening brief, the defendant certain time to answer it and the plaintiff certain time to reply, the case then to stand submitted. The parties had respectively taken more time than the order contemplated in which to file their briefs but all save the plaintiffs' reply brief were on file, and the plaintiffs had exceeded the time allowed them in which to file that, but it was not yet on file when one of the defendants died. The court held that, notwithstanding that at the time of his death the case was not actually under submission, yet, the situation being that the court might have taken it under submission and decided it without permitting the delayed final brief to be filed, no reason existed why it could not file its findings and enter its judgment as of the date prior to the decedent's death when the evidence was concluded, and its action in doing so was upheld.

In *Norton v. City of Pomona*, supra, page 62, 53 P.2d page 953, in sustaining the making of findings and entry of a judgment nunc pro tunc, as of a date prior to a plaintiff's death, where the case had been submitted on briefs, and the trial court had reached its conclusion and entered a "minute order for judgment" in a certain amount in plaintiff's favor, but had not actually signed or filed any findings before he died, it was (page 62, 53 P.2d page 955) said:

"The power to enter judgments nunc pro tunc is inherent in the courts. Where the party is not at fault, the determinative consideration moving the court is whether or not the action at the death of the party was ready for rendition of final judgment. When the state of the record or the minutes kept by the court or clerk show that a suitor

was entitled to a particular judgment but that the judgment was not entered when it might have been, such judgment may subsequently be entered so as to relate back to the time when it should have been entered, providing the delay was not occasioned by the party applying. Such an order should be granted or refused as justice may require in view of the circumstances of a particular case." Citing *Estate of Pillsbury*, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396.

All of the cases above referred to were grounded upon torts. The two first mentioned, however, *Fox v. Hale & Norcross S. M. Co.* and *Leavitt v. Gibson* involved fraud committed in dealing in real estate where the causes of action, in any event, would have survived the decedent's death. In *Estate of Pillsbury*, *supra*, however, and *Norton v. City of Pomona*, what were involved were purely personal torts in which the cause of action was only saved by the power to make the findings and enter the judgment *nunc pro tunc* as of a date prior to the decedent's death. Such is the situation in the instant case.

[2] It is claimed, indeed, that respondents' counsel were dilatory in the time taken in preparing their findings. The trial court, however, determined otherwise, and, that being a matter which it was its province to decide, we would only be called upon to review an abuse of its discretion. We find no such abuse here.

[3] A different and more serious question is raised in the instant case by the circumstance that, on April 16, 1937, and April 17, 1937, the respective dates on which the *nunc pro tunc* findings were actually filed and the *nunc pro tunc* judgment actually entered, no order had as yet been made in the trial court substituting Mrs. Scoville as administratrix of her husband's estate for him. To appreciate the bearing of this question reference must be had to the case of *De Leonis v. Walsh*, 140 Cal. 175, 73 P. 813. One Etchepare, who had been a defendant in that case, died on June 7, 1901, after the case had been submitted for decision. On June 11, 1901, the findings were filed. On October 10, 1901, Etchepare's administrator was substituted for him as a party defendant by the trial court. The judgment was filed on October 14, 1901, and entered on October 16, 1901. Both findings and judgment contained a direction that they be respectively filed and entered *nunc pro tunc* as of June 3, 1901.

Notice of appeal was served and filed on December 12, 1901. The statute forbade consideration of the question whether the evidence was sufficient to sustain the findings unless the appeal were taken within sixty days after the filing of the findings of fact and conclusions of law, which constituted the decision of the court. It was in substance said that since the power of the court to render a *nunc pro tunc* decision and judgment is one "to be exercised only for the purpose of doing justice between the parties * * * the exercise of such power will never be allowed to have the effect of depriving the representatives and successors of the deceased defendant of the right to a review of the decision by the appellate court in the usual manner, or of shortening the time within which proceedings for such review may ordinarily be instituted", and that "the time within which such proceedings for review may be instituted cannot commence to run until the decision is actually rendered; i. e., until the findings are actually filed, regardless of the day as of which they are filed." (page 814)

The court then said:

"If in this case the findings had been properly filed on July 11, 1901, the authorities would compel us to hold that judgment was actually rendered on that day, and that the appeal was not taken in time to allow a review of the evidence. But that date also must be disregarded, we are satisfied, for the reason that at that time there had been no substitution of any representative of the deceased. The defendant having died, the court could, on motion, allow the action to be continued against his representative (section 385 Code Civ.Proc.), but it could regularly take no action in the case until there was a substitution of some one to defend the action, especially as the death of the defendant had been suggested to it. The rendition of judgment *nunc pro tunc* in *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 P. 328, was made after such substitution and on notice. Until such substitution was had, no judgment could legally be rendered, and, so far as the time of rendition of judgment is concerned, the case stands precisely as if no findings were ever filed. The filing of the judgment on October 14, 1901, and its entry on October 16, 1901, were the first steps legally taken by the court after the substitution had been made, and for all the purposes of the appeal the judgment can be considered as

rendered not earlier than October 14, 1901. The appeal taken on December 12, 1901, was, therefore, taken within sixty days after the rendition of judgment."

Planting themselves on this language appellants now contend that since, when the findings in the instant case were filed, that is on April 16, 1937, and when the judgment was entered, that is on April 17, 1937, no substitution for J. M. Scoville of his administratrix having yet been made in the trial court, both the findings and judgment were ineffectual in so far as they were in the decedent's favor.

We are unable, in view of the Supreme Court's language in *De Leonis v. Walsh* to avoid the conclusion that the trial court erred in undertaking to file its findings of fact and conclusions of law and to enter its judgment before making an order of substitution of the administratrix of the estate of J. M. Scoville for that plaintiff. In so far as the interest of the decedent was concerned there was at the date when the findings of fact and conclusions of law were actually filed and the judgment entered no plaintiff before the court. To be sure, after the findings of fact and conclusions of law should be properly filed and the judgment properly entered they would be treated by the law for the purpose of avoiding the lapsing of the cause of action as having been made as of the date to which it was provided that, *nunc pro tunc*, they should relate. But if when they were respectively filed and entered in fact there was as to the decedent's interest no plaintiff before the court the defect would appear to us to go to the jurisdiction to file and enter them.

What has just been said, however, goes only to the making of the *nunc pro tunc* findings and the entry of judgment thereon in so far as such findings and judgment were in favor of J. M. Scoville, or in favor of the community consisting of the two original plaintiffs. As of December 1, 1936, that community existed and the right to manage the community property was in J. M. Scoville. So far as any judgment to which Margaret W. Scoville was, in her personal capacity, entitled, was concerned, the court's right to enter it was manifestly not interrupted by her husband's death. Both for that reason and also as a basis for deciding what ought to be done with respect to the interest of J. M. Scoville in the case, we proceed to examine the further questions raised by the appeal. The

trial court's finding (No. 7) on the subject of damages was as follows:

"That as the direct and proximate cause of the said negligence on the part of said Keglör, the said Dodge Sedan of the plaintiff Margaret Scoville was demolished to her damage in the sum of Six Hundred Dollars (\$600.00); and the plaintiff Margaret Scoville suffered lacerations and abrasions and bruises and pain therefrom and required and received medical attention; and the plaintiff J. M. Scoville received lacerations, broken bones in the left leg, broken ribs, a collapse of the right lung and bruises and other bodily injuries and required and received medical attention and hospitalization and suffered loss of salary until December, 1934, in the sum of One Hundred and Sixty Dollars (\$160.00) per month; all to the damage of the plaintiffs in the sum of Four Thousand Nine Hundred Ninety-seven Dollars (\$4,997.00)."

[4, 5] Judgment, however, was, on the findings entered in favor of J. M. Scoville and Margaret W. Scoville together for the aggregate lump sum of \$4,997. The findings do segregate out the \$600 for demolition of the Dodge car, which is the only item that we can distinctly say was separate property of Mrs. Scoville. All general damages for personal injuries to either spouse were, of course, community property. Civ.Code, § 161a; *In re Strand*, 123 Cal.App. 170, 171, 11 P.2d 89. That also is true of the damages for loss of time and impairment of the husband's earning capacity. It is presumably true also of the expenses incurred by either spouse in the treatment of his or her injuries, in the absence of allegations that his or her separate estate was in some manner specially obligated for their payment. In support of the action of the trial court, then, we can reasonably treat the findings as having so far segregated the items that there is no confusion with respect to the portion of the award which is separate property and the portion thereof which is community property. There is, however, a failure to segregate from each other various items awarded in response to causes of action which are community property. Since the loss of salary of J. M. Scoville is found to have amounted to \$160 per month for the period between the date of the accident and the beginning of December, 1934, and that is certain which can be made certain, it would be

possible to ascertain the portion of the award attributable to that item of special damage. Except, however, for the damage awarded for destruction of the automobile and this last-mentioned item, everything else, that is general damages for personal injuries to each of the spouses and special damages for the expense of medical and other attention to the same, are all lumped together and included with the two items just referred to, as specifically mentioned, in the aggregate total of \$4,997. For the most part this confusion did not exist in the complaint, although a portion of the claim made for personal injuries to Mrs. Scoville was therein grouped with the medical expense claimed for attention to her injuries.

It was said in *Klein v. Milne*, 198 Cal. 71, 76, 243 P. 420, 422, that:

"Where a complainant or cross-complainant does not in his pleading rely upon a general averment of damages, but pleads both general and special damages, and particularizes the items wherein each consists, and where the defendants or cross-defendants put these specifically in issue, they are entitled to special findings upon the issues as thus presented in order that they may point out the precise errors of the trial court upon motion for a new trial and upon appeal." Citing *Franklin v. Franklin*, 140 Cal. 607, 609, 74 P. 155, and *Frascona v. Los Angeles Ry. Corp.*, 48 Cal.App. 135, 191 P. 968.

The rule thus laid down was reiterated in *James v. Haley*, 212 Cal. 142, 146, 147, 297 P. 920. See, also, *Miller & Lux, Inc., v. Tulare Lake, etc., Dist.*, 219 Cal. 41, 46, 25 P.2d 451, and *Cargnani v. Cargnani*, 16 Cal.App. 96, 99, 116 P. 306.

[6,7] It is manifest that the court's decision to some extent disregarded this rule. It does not in all cases follow that errors of this description are prejudicial to the losing party. It frequently happens, indeed, that a judgment in solido in favor of two parties plaintiff, is for some reason or other not prejudicial to a defendant. *Meek v. Pacific Electric Ry. Co.*, 175 Cal. 53, 164 P. 1117; *Fairchild v. Bay Point & C. Ry. Co.*, 22 Cal.App. 328, 330, 134 P. 338; *De Arman v. Connelly*, 134 Cal.App. 173, 181, 25 P.2d 24. Segregation is, in some circumstances, said to have been no concern of the losing party and therefore no reason for the reversal of a judgment. In the instant case, however, where the presence of the husband, who as of December

1, 1936, the date to which the nunc pro tunc judgment was made to relate back, and who as of that date had the management of the community property, was necessarily essential to the entry of a judgment in favor of the community, and where, as we have hereinbefore held to be the case here, there was, for some reason, want of jurisdiction to enter the nunc pro tunc judgment as to him, it seems manifest that a judgment combining in solido such void judgment as to him with a judgment otherwise good in favor of his wife, as to separate property of hers, can, as now entered, hardly stand.

The next point made for appellants that the findings do not support the judgment is without merit and we will not pursue it.

It is, however, seriously claimed that the evidence is insufficient to support any finding of negligence on the part of appellants. In ordinary circumstances it would have been a violation of subsection (a) of section 136 of the California Vehicle Act St.1923, p. 561, as amended by St.1931, p. 2128 as in force when the collision occurred for appellants to have left their truck and trailer standing on the highway inasmuch as there was not a clear and unobstructed width of not less than fifteen feet on the highway opposite the standing vehicle left for the free passage of other vehicles thereon. The inhibitions of this statute, however, are subject to an exception, as follows:

"The provisions of this subsection shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a public highway in such manner and to such an extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

[8,9] It has frequently been held that where a vehicle is to such an extent disabled that it is physically impossible to move it, it is not, in itself, negligence as a matter of law to leave it upon the main traveled portion of a highway until it is reasonably practicable to remove it. *Rath v. Bankston*, 101 Cal.App. 274, 281 P. 1081; *Silvey v. Harm*, 120 Cal.App. 561, 568, 8 P.2d 570; *Fleming v. Flick*, 140 Cal.App. 14, 22, 35 P. 2d 210; *Held v. Jirdon*, 5 Cal.App.2d 531, 533, 42 P.2d 1046. In several of these cases the above quoted proviso of section 136(a) of the California Vehicle Act was considered and held applicable. In *Smith v. Pacific Greyhound Corp.*, 139 Cal.App. 696, 35 P.2d 169, where the stoppage of the

machine had been due to a failure of its lights, the operator was said to have come within the same exception. See, also, *Giorgetti v. Wollaston*, 83 Cal.App. 358, 257 P. 109. Whether the occasion for stopping was sufficiently imperative to bring the driver within the exception is ordinarily a question not of law but of fact. *Giorgetti v. Wollaston*, supra, pages 363, 364, 257 P. 109; *Fleming v. Flick*, supra, page 21, 35 P.2d 210.

[10, 11] Even, however, if Keglор was justified in stopping when he did stop, such justification would not be necessarily determinative of the instant case. Here there was involved not merely the matter of parking the truck and trailer upon the pavement of the highway, but there was also involved the question as to whether Keglор, the driver, did in fact use reasonable care to notify the public of its presence. True, he claims, as we have seen, to have stood in the highway and signalled respondents' vehicle with his flashlight, but in view of the fact that none of the occupants of the car coming from the east saw the flashlight, the trial court was under no obligation to believe that he used it, and to the extent that its findings are properly on file we are bound by its express determination that he did not. Moreover, it was for the trial court to say whether, in order to have effectually signalled, he ought not to have stationed himself behind the trailer instead of abreast the front of the truck. To the effect that this element may be material, see *Silvey v. Harm*, supra. The trial court was not, of course, even bound to believe Keglор's testimony as to the shortness of time that elapsed between the stopping of the truck and the collision, or to believe that there was not time in which to have awakened Hamilton and gotten out and set the flares. Indeed, though the record shows that there was a curve in the road between Grey's Wells and the place where the accident occurred and some slope to the ground, there is nothing to indicate any obstruction, as far as the terrain was concerned, to seeing for a long distance and the court may well have believed that the very fact that the occupants of respondents' car had not noticed the truck and trailer ahead of them indicated that the lights were out for a longer time than Keglор admits. Again the trial court may have believed that due care would in the circumstances have required Keglор, instead of stopping, when his lights began to dim, to have continued until he reached

a service station which he himself says that he knew to exist about a mile ahead. Indeed, while the general burden of proof continued with the plaintiffs yet it must be remembered, as said in *Casey v. Gritsch*, 1 Cal.App.2d 206, 211, 36 P.2d 696, 698, quoting from *Watt v. Associated Oil Co.*, 123 Or. 50, 260 P. 1012, that:

"One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute."

In our opinion the question of negligence on the part of the appellants was one for the determination of the trial court and we cannot say that its determination was not sustained by the evidence.

[12] It is further claimed on behalf of the appellants that the decedent, J. M. Scoville, was himself negligent as a matter of law in that he admits being partially blinded by the lights of the automobile said to have been coming from the west, in which circumstance it is claimed that he was in duty bound to slow down his machine accordingly. Citing *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A.L.R. 401; *Woodhead v. Wilkinson*, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125; *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; *Meads v. Deener*, 128 Cal.App. 328, 17 P.2d 198. It appears to us, however, that that is, in the circumstances of this present case, again a question of fact. It must be remembered that he was operating upon the right side of the highway and that in ordinary circumstances vehicles proceeding westerly would give warning by tail-lights of their presence, that vehicles proceeding easterly would not have interfered with him, and that a stalled vehicle without lights presented a somewhat unusual situation.

It has been held in several recent cases that the failure to see an unlighted object within the range of one's headlights is not, as a matter of law, negligence. *Casey v. Gritsch*, 1 Cal.App.2d 206, 213, et seq., 36 P.2d 696; *Smarda v. Fruit Growers' Supply Co.*, 1 Cal.App.2d 265, 36 P.2d 701;

Hine v. Leppard, 5 Cal.App.2d 154, 156, 42 P.2d 389, 43 P.2d 595. In these circumstances it was for the trial court to find as a fact whether or not Scoville was guilty of contributory negligence.

Any question that may exist in the case about the regularity of the action of the trial court in undertaking to substitute for J. M. Scoville as a party plaintiff Mrs. Scoville as administratrix of his estate after the appeal from the judgment had been taken to this court may now be treated as eliminated by the action of this court in making its own order of substitution, which may now be treated as effectual for all purposes of the case.

The judgment is reversed and the cause remanded to the trial court with instructions to that court to make findings of fact in accordance with the evidence already taken and the views herein expressed, including a specification with proper particularity of all items of damage allowed, and to file such findings together with judgment thereon nunc pro tunc as of December 1, 1936.

We concur: BARNARD, P. J.; MARKS, J.



27 Cal.App.2d 56

**OLINDA IRRIGATED LANDS CO. v.
YANK (MILLER et al., Inter-
veners).**

Civ. 5914.

District Court of Appeal, Third District,
California.

June 8, 1938.

1. Limitation of actions ⚡165

The statute of limitations is a bar to a remedy only and does not extinguish or even impair the obligation of the debtor.

2. Limitation of actions ⚡165

The statute of limitations is available only as a matter of defense, and cannot be set forth in an action in behalf of a debtor as conferring on him a substitute right.

3. Limitation of actions ⚡165

The statute of limitations is to be used as a shield and not as a sword.

4. Limitation of actions ⚡103(2)

The statute of limitations does not begin to run in favor of a trustee until a repudiation of the trust.

5. Equity ⚡66

Where one comes into equity seeking relief, he must first do equity.

6. Limitation of actions ⚡165

The rule with regard to the limit of the right to rely on the statute of limitations as substantive right of action is the same whether the plaintiff is an ordinary debtor or is a trustee under an express trust.

7. Limitation of actions ⚡165

Where irrigation district was dissolved and water company and land company organized and the lands, which had been taken over by the irrigation district for nonpayment of assessments, were given to the land company to sell and pay unpaid warrants and bond coupons of the irrigation district, the fact that certificates of indebtedness, which were placed in the hands of the clerk of the court by the land company, had not been exchanged by holder of warrants, would not give land company right to obtain a decree to the effect that the indebtedness had been barred by limitations. Gen.Laws 1931, Act 3876.

8. Waters and water courses ⚡230(6)

Where irrigation district was dissolved by decree of court and a water company and land company organized, and the lands, which had been taken over by the irrigation district for nonpayment of assessments were given to the land company to sell and pay unpaid warrants and bond coupons of the irrigation district, the decree of distribution constituted the measure of the land company's powers, and any attempted execution of powers in contravention thereof, by one having full knowledge of the contravention, would be absolutely void. Gen.Laws 1931, Act 3876.

9. Trusts ⚡231(1)

The fact that transaction, whereby land company as trustee conveyed lands formerly belonging to irrigation district to holder of certificates of indebtedness in exchange for the certificates, was beneficial to land company and water company, which had been organized on dissolution of irrigation district, would not render transaction valid as to the holders of other certificates, where the transaction was in contravention of land company's powers given by decree of distribution, since a trustee, in dealing with trust

company, cannot be advantaged to the detriment of the beneficiaries of the trust. Gen. Laws 1931, Act 3876.

10. Waters and water courses ⇨230(6)

Where irrigation district was dissolved by decree of court and a water company and land company organized, and the lands, which had been taken over by the irrigation district for nonpayment of assessments, were given to the land company to sell and pay unpaid warrants and bond coupons of the irrigation district, the land company, if it wished to exchange lands for certificates of indebtedness, should have applied to the court for modification of the decree of dissolution and an enlargement of its powers. Gen. Laws 1931, Act 3876.

11. Judgment ⇨678(4)

Where certain holders of certificates of indebtedness of land company and warrants of indebtedness of irrigation district, whose lands the land company had taken over, were not parties to action in which a transaction, in which the land company exchanged some of the lands for certificates of indebtedness of other holder, was declared valid, the judgment was not res judicata as to those holders.

12. Waters and water courses ⇨230(8)

Where land company, in contravention of its powers as trustee, conveyed lands formerly belonging to irrigation district to holder of land company's certificates of indebtedness in exchange for the certificates, and land company thereafter brought action to recover possession of certain other certificates of indebtedness, court erred in refusing to bring in as parties the holder of certificates to whom the land company had conveyed lands, and water company, which with land company had been organized on dissolution of irrigation district. Gen. Laws 1931, Act 3876.

13. Limitation of actions ⇨95(1)

Where irrigation district was dissolved by decree of court and a water company and land company organized, and the lands, which had been taken over by the irrigation district for nonpayment of assessments, were given to the land company to sell and pay unpaid warrants and bond coupons of the irrigation district, the statute of limitations would not begin to run as against holders of warrants or certificates of indebtedness of land company until they had knowledge that moneys had been secured with which their claims might be satisfied.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by the Olinda Irrigated Lands Company against Errol A. Yank, etc., to recover possession of certain certificates of indebtedness and to obtain a decree adjudging that the statute of limitations had run against the certificates, and that the statute of limitations had run against certain warrants which were to be exchanged for the certificates, wherein T. M. Miller and others intervened as plaintiffs. From an adverse judgment, the plaintiff and the intervening plaintiffs appeal.

Judgment as to plaintiff affirmed and judgment as to interveners reversed and cause remanded with directions.

L. C. Smith, of Redding (S. Victor Wagler, of Oakland, of counsel), for plaintiff, appellant and respondent.

Carr & Kennedy, of Redding, for intervening plaintiffs, respondents and appellants.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to recover possession of certain certificates of indebtedness, and also to obtain a decree of the court adjudging that the statute of limitations had run against said certificates, and also that the statute of limitations had run against certain warrants which were to be exchanged for the certificates just referred to.

The decree and judgment of the trial court was to the effect that the plaintiff take nothing by reason of this action. From this decree and judgment, the plaintiff appeals.

In this appeal the plaintiff sets forth the following grounds to support its contentions:

That the uncontradicted evidence shows that the warrants issued by the district hereinafter mentioned are outlawed; that the uncontradicted evidence shows that the warrants and certificates of indebtedness issued by the plaintiff hereinafter mentioned are outlawed; that the evidence shows without contradiction that the rights of the interveners to change their warrants for certificates of indebtedness is barred by the statute of limitations; that the evidence is insufficient to support the finding that the plaintiff will not be damaged; that the court erred in overruling plaintiff's demurrer to the plaintiff's complaint in intervention; that the court erred in denying plaintiff's

motion to strike out the complaint in intervention; that the court erred in granting intervenor's motion to strike out certain portions of plaintiff's answer to the complaint in intervention; and that the court erred in granting intervenor's motion to strike out certain documentary evidence from the record.

As the decree of the court was to the effect that the interveners take nothing by reason of their action, it is not very readily perceived how any ruling of the trial court affecting the interveners could be prejudicial to the plaintiff.

It further appears from the record that the plaintiff has appealed only from the action of the trial court to the effect that plaintiff take nothing by reason of its complaint, and the further ground that the court denied the prayer of the plaintiff's complaint that it recover of and from the county clerk certain certificates of indebtedness hereinafter referred to.

From the foregoing it is apparent that we need only consider in relation to the plaintiff's appeal the specific grounds set forth in its notice of appeal as just stated.

The intervening plaintiffs have likewise appealed from the decree of the trial court denying their prayer for relief.

The questions presented upon these appeals have their origin in a decree entered by the trial court dissolving a certain irrigation district known as and called the "Happy Valley Irrigation District". The decree for the dissolution of said district was made in accordance with an act of the legislature approved February 10, 1903. Deering's Gen.Laws, Act No. 3876. The decree of dissolution was entered on or about the 26th day of June, 1925. This decree provided for the organization of two entities to be known, first, as the "Happy Valley Water Company"; second, as the "Olinda Irrigated Lands Company", the water company taking over the reservoirs, ditches, and property pertaining to the distribution of water, and the irrigated lands company taking over all the lands that had been sold by reason of nonpayment of assessments, with the power to collect money on the redemption of lands sold for nonpayment of assessments, and also with power to sell and dispose of the lands, the title to which had previously come into the possession of the Happy Valley Irrigation District.

The decree of distribution of the Happy Valley Irrigation District, in specifying the

powers and duties of the Olinda Irrigated Lands Company, reads as follows, to-wit:

"11. That the Olinda Irrigated Lands Company is entitled to take, own and hold, all of the certificates of sale for delinquent assessments upon the lands and premises within said Happy Valley Irrigation District, and to foreclose the lien of said delinquent assessments evidenced by and represented in said several certificates of delinquent sale, which are more particularly described in paragraph XIII of the findings herein, and the board of directors of the Happy Valley Irrigation District is hereby empowered, authorized and required to transfer and to execute and deliver a proper conveyance of all of said certificates of sale, and of all and every lien held by said District, and of all the right, title and interest which said District may have of, in and to said certificates of sale, and of all liens, or lien, for said delinquent assessments, and of all right, title or interest of said Happy Valley Irrigation District in and to each and every and all of said respective tracts, parcels and pieces of land.

"14. That the payment of the indebtedness represented by the unpaid warrants and unpaid bonds coupons shall be made by the Land Company known as 'Olinda Irrigated Lands Company', in accordance with the Plan of Dissolution as set forth herein. The indebtedness represented by said unpaid warrants to be satisfied in the order of the registration of said warrants, and the said indebtedness represented by the said unpaid interest coupons shall be paid pro rata after all indebtedness represented by said unpaid warrants shall have been satisfied."

It was further provided in the decree of dissolution that the funds for the satisfaction of the indebtedness represented by unpaid warrants and unpaid bonds coupons, as set forth, should be derived from the redemption and sale, or redemption or sale of the lands of said district for which certificates of sale for delinquent assessments had been issued. As to first-grade lands, the sale was to be made subject to a lien of \$60 per acre in favor of the Happy Valley Water Company. The decree then provided for the issuance of certificates by the Olinda Irrigated Lands Company to be exchanged for warrants of indebtedness against the Happy Valley Irrigation District, and also for interest coupons due upon the bonds of said last-mentioned district.

It thus appears that all the lands which had gone delinquent by reason of the non-

payment of assessments, and the title to which, and the right to the title to which had become vested in the Happy Valley Irrigation District, were to be, and were subsequently transferred to the Olinda Irrigated Lands Company for a specific purpose, to-wit: The sale of the lands, the collection of money on account of the redemption thereof, and the application of such proceeds to the payment of certificates of indebtedness issued in exchange for warrants. The lands just referred to were not purchased by the plaintiff (which will hereinafter for convenience be called the "Lands Company"), but were simply taken over in accordance with the decree of dissolution of the Happy Valley Irrigation District, for the specific purposes which we have just mentioned. No argument is required following this statement, nor do we think it necessary to cite any authorities in support of the conclusion that the Lands Company became a trustee for the specific purposes mentioned in the decree of dissolution which we have set forth.

While the record shows that the Lands Company has not complied with the terms and conditions of the trust imposed upon it, there is nothing contained therein which indicates that prior to the beginning of this action the Lands Company had repudiated its trust.

[1-4] The laws seem to be pretty well settled that the statute of limitations is a bar to a remedy only, and does not extinguish or even impair the obligation of the debtor. The statute is available only as a matter of defense, and cannot be set forth in an action in behalf of a debtor as conferring upon him a substantive right. As said in one of the cases: "It is to be used as a shield, and not as a sword." *Spect v. Spect*, 88 Cal. 437, 26 P. 203, 205, 13 L.R.A. 137, 22 Am.St.Rep. 314; *Puckhaber v. Henry*, 152 Cal. 419, 93 P. 114, 125 Am.St.Rep. 75, 14 Ann.Cas. 844; 37 C.J. 648; *Johnson v. Wynne*, 64 Kan. 138, 67 P. 549. The law is likewise well settled that the statute of limitations does not begin to run in favor of a trustee until a repudiation of the trust. *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 P. 360; *MacMullan v. Kelly*, 19 Cal.App. 700, 127 P. 819; *Allen v. Freear*, 50 Cal.App. 645, 195 P. 748; 37 C.J. 958.

[5] We do not need to cite any authorities that where one comes into equity seeking relief he must first do equity.

The cases cited by the appellant on the question of the statute of limitations, we find upon examination to have no bearing upon cases where the debtor is beginning and prosecuting the action. The Lands Company cites particularly the case of *People v. Honey Lake Valley Irrigation District*, 77 Cal.App. 367, 246 P. 819. An examination of that case shows that the statute was used as a defense and not as a sword. The same is true as to the other cases relied upon by the appellant Lands Company.

[6, 7] The rule with regard to the limit of the right to rely upon the statute of limitations as a substantive right of action is the same whether the plaintiff is an ordinary debtor or is a trustee under an express trust. The appeal by the Lands Company is shown by the foregoing to be absolutely without merit. The fact that the certificates of indebtedness which were placed in the hands of the clerk of the court by the plaintiff, to be exchanged for warrants, have not been exchanged, does not add to the right of the plaintiff Lands Company to maintain this action, or to obtain a decree to the effect that its indebtedness has been barred by the statute of limitations, and therefore, that the Lands Company has been relieved from any obligation to discharge the indebtedness, and apply the trust funds in liquidation of the indebtedness in accordance with the purposes for which it was formed, and in accordance with which it took over the delinquent lands of the Happy Valley Irrigation District.

The record shows a striking disregard of the terms of the decree of distribution of the Happy Valley Irrigation District, in that a considerable sum of money was realized by the Lands Company from the redemption and sale of delinquent lands, sufficient to discharge the warrants issued by the Happy Valley Irrigation District, but said moneys were used in the payment of fees and expenses. Nothing in relation thereto is involved in this proceeding. Subsequently, however, it does appear that 3984.41 acres of what was denominated as "third grade land" were conveyed to the president of the Lands Company, William Plotts, in exchange for \$80,000 of certificates of indebtedness held by him, said amount including accumulated interest.

The complaint in intervention sets forth the ownership of certificates of indebted-

ness issued by the Lands Company, and also the ownership of warrants of indebtedness issued by the Happy Valley Irrigation District which had not been exchanged for the certificates issued by the Lands Company, and asking for a decree directing such exchange be made by the clerk of the court delivering to the interveners, certificates in exchange for warrants. The complaint in intervention also asked that William Plotts and the Happy Valley Water Company be brought in as parties to the action, and that the deed of conveyance of the lands just referred to, made by the Lands Company to Plotts, and by him subsequently conveyed to the Water Company, be set aside. The court denied this relief, upon just what theory does not appear plain from the record. The proceedings leading up to the conveyance of the land just referred to, by the Lands Company to William Plotts, is somewhat novel. First, a resolution was passed by the vote of three members of the board of directors of the Lands Company, to-wit: William Plotts, Thomas P. Plotts, and a director by the name of Ernest Dozier. The resolution provided for the exchange of lands for certificates instead of the sale of lands, as directed by the decree of the court. Following this, an executive committee was appointed by the votes of the same three directors, and William Plotts, Ernest Dozier and Thomas Plotts were appointed as such executive committee. Thereupon, Ernest Dozier, acting as vice-president, and Thomas Plotts as secretary, executed a deed conveying the lands mentioned to William Plotts in exchange for certificates of the face value of something over \$80,000. While the interveners have alleged this transaction to be fraudulent and not covered by the provisions of section 311 of the Civil Code, we do not need to discuss the question of fraud. All the members of the executive committee, including William Plotts, the grantee in the deed just referred to, were familiar with the provisions of the decree of dissolution, which conferred no power whatever upon either the board of directors, nor an executive committee to transfer or deed any of the delinquent lands of the district, except for payment in cash. This payment was to be first applied in the payment of the indebtedness of the Happy Valley Irrigation District, evidenced by outstanding warrants.

[8] We do not need to cite authorities to the effect that the procedure provided

in the decree of distribution, setting forth the manner in which the Lands Company should execute its trust, constituted the measure of its powers, and that any attempted execution of powers in contravention thereof, by one having full knowledge of the same, would be absolutely void.

[9, 10] The court found that the transaction was beneficial to the Water Company and also to the Lands Company. The validity of the transaction cannot be upheld by reason thereof, for the law is well settled that a trustee, in dealing with trust property, cannot be advantaged to the detriment of the beneficiaries of the trust. In this case the beneficiaries of the trust were entitled, as we have said, to have the lands sold for cash. The fact that other holders of certificates were given the same opportunity to take lands for their certificates, affords no support for the transaction between William Plotts and the executive committee of the Lands Company just mentioned. The proper procedure available under the conditions which we have set forth herein would be, and would have been to apply to the trial court for a modification of the decree of dissolution and an enlargement of the powers of the Lands Company while acting in the capacity of a trustee in seeking to sell the delinquent lands, and apply the proceeds in payment of the indebtedness of the Happy Valley Irrigation District.

[11, 12] It appears from the record that a case entitled *Brown v. Plotts* was tried in the superior court, in which the validity of the transaction which we have just mentioned was upheld. The Lands Company relied upon the decision in that case as a bar to the contention of the interveners. The record before us, however, shows that the interveners were not parties to that action, and that as to them, whatever judgment was entered in the case of *Brown v. Plotts* is not *res judicata* as to their rights. That the court was in error in refusing to bring in William Plotts and the Happy Valley Water Company in order that the right of the interveners to have the validity of the deeds referred to passed upon and the relief prayed for by the interveners either granted or denied, seems to us to require no further comment. The interveners were also entitled to have the status of their claims adjudicated by the trial court.

[13] There is nothing in the record to show that any holders of certificates or warrants were ever notified that any moneys

had been secured with which their claims might be satisfied. Under such circumstances the statute of limitations would not begin to run until such moneys were on hand and the holders of evidence of indebtedness had knowledge thereof and an opportunity to present the same for liquidation.

While many other questions have been presented upon the briefs filed in this action, it does not seem necessary to discuss further the different points raised and relied upon by the respective parties, as what we have said is sufficient to show that the judgment as to the plaintiff's cause of action must be, and the same is, hereby affirmed; and that the decree and judgment in relation to the interveners must be, and the same is, hereby reversed, and the cause remanded to the trial court with directions to grant the petition of the interveners to have William Plotts and the Happy Valley Water Company brought into the action as parties thereto.

The respective parties will pay their own costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.



27 Cal.App.2d 34

STONE v. CITY AND COUNTY OF SAN FRANCISCO (two cases).

Civ. 10188.

District Court of Appeal, First District,
Division 1, California.

June 7, 1938.

1. Appeal nad error ⇨927(3)

On appeal from order granting nonsuit, evidence must be taken as true and construed most strongly in plaintiff's favor.

2. Automobiles ⇨187

A municipality is liable for negligence of operator of its authorized emergency vehicle responding to emergency call when operator has made arbitrary exercise of privileges granted him by the Vehicle Act, and the failure to sound his siren or give warning of his approach will be considered such an "arbitrary" action. Civ.Code, §

1714½; St.1929, p. 539, § 120; St.1931, p. 2101, § 8½.

[Ed. Note.—For other definitions of "Arbitrary," see Words & Phrases.]

3. Automobiles ⇨187, 245(26)

Under statute governing liability of municipality for negligence of operator of emergency vehicle, municipality is not liable for ordinary negligence, but only for operator's arbitrary conduct, and where question of arbitrariness is involved, issue of fact is raised similar to that involved under last clear chance doctrine. St.1929, p. 539, § 120.

4. Statutes ⇨225

Statutes on the same subject matter should be read together and each given full force and effect as far as possible.

5. Automobiles ⇨187

A statute relieving municipal employees or officers from liability for damage arising from their operation of emergency vehicles while responding to emergency calls does not relieve municipalities from liability for negligence of such employees or officers, in view of another statute making municipality responsible for injuries caused by negligent operation of its motor vehicles by any officer, agent, or employee. Civ.Code, § 1714½; St.1929, p. 568.

6. Courts ⇨91(1)

Supreme Court decisions, which were rendered after trial in other actions arising out of automobile accident, but were declaratory of existing law applicable when accident occurred, were controlling on District Court of Appeal on appeal in such other actions.

7. Automobiles ⇨245(19)

In actions against municipality for injuries from collision, at intersection, between automobile in which plaintiffs were riding and police radio automobile, evidence, showing that driver of police radio automobile, responding to fire call, went through stop sign while exceeding speed limit, and without sounding siren or giving other timely warning, did not authorize nonsuit. Civ. Code, § 1714½; St.1929, pp. 539, 542, §§ 120, 132; St.1931, p. 2101, § 8½.

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Actions by Eva A. Stone and by Merle Stone, as guardian ad litem of his minor

daughter, against the City and County of San Francisco for injuries sustained in a collision between an automobile driven by Merle Stone and a police radio automobile. From a judgment of nonsuit, plaintiffs appeal.

Reversed and remanded for new trial.

Dunnell & Wollenberg, of San Francisco, for appellants.

Allen Spivock, of San Francisco, amicus curiae in support of appellants.

John J. O'Toole, City Atty., Henry Heidelberg, and Norman Sanford Wolff, Deputy City Atty., all of San Francisco, for respondent.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Albert E. Wheatcroft and Arthur Loveland, Deputy City Attys., all of Los Angeles, Harold P. Huls, City Atty., of Pasadena, and F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, amici curiae in support of respondent.

BRAY, Justice pro tem.

The question primarily involved here is whether or not the City and County of San Francisco is liable for injuries caused by its police officers driving an emergency vehicle in an arbitrary manner while responding to an emergency call.

This is an appeal from a judgment of nonsuit rendered in favor of the City and County of San Francisco. Two separate actions were brought against it for damages received as a result of a collision between an automobile driven by one Merle C. Stone and a radio patrol car owned by the City and County of San Francisco and operated by its duly authorized police officers responding to a police call. In one suit the plaintiff was Eva A. Stone, wife of the said driver Merle C. Stone, suing for her injuries and in the other suit Merle C. Stone sues as the guardian ad litem of his minor daughter who was a passenger in the car and also received injuries. The two actions were consolidated for trial and likewise for the purposes of appeal.

[1] The accident occurred at 7:30 p. m., November 19, 1933, at the intersection of Vicente street and Sunset boulevard in San Francisco. The car in which plaintiffs were riding was traveling south on Sunset boulevard. Two San Francisco police officers were answering a fire call in the police radio car. They were traveling east-

erly on Vicente street, which made it necessary for them to cross Sunset boulevard, which is known as a through highway and at the entrance to which on Vicente street there were the usual arterial stop signs requiring vehicles to come to a stop before entering the intersection. It is admitted for the purposes of this appeal that at the time of the accident the police radio car was being operated as an authorized emergency vehicle in responding to the fire call and that it was exceeding the speed limit and that it went through the arterial stop sign (that is, did not stop at the intersection), and that the red lights of the car were not burning. The only dispute as to the facts is as to whether the siren was sounded on the police car in time to warn the driver of plaintiff's car. However, the only evidence upon this subject is that of the plaintiff's witnesses, and under the rule that on an appeal from an order granting a nonsuit the evidence must be taken as true and construed most strongly in plaintiff's favor, there is ample evidence that the siren was not sounded except practically simultaneously with the collision. The nonsuit was granted solely upon the ground that the city was not liable for the acts of its police officers in operating in the manner shown by the evidence, an authorized emergency vehicle.

Appellants predicate liability under section 1714½ of the Civil Code, in effect at the time of the accident. That section (now substantially section 400, Vehicle Code, St.1935, p. 152) provided in effect, that a municipal corporation is responsible for injuries to persons or property caused by the negligent operation of its motor vehicles by any officer, agent or employee.

Respondents and the the amici curiae contend that this section does not apply to injuries caused by authorized emergency vehicles as defined in the Vehicle Act, responding to emergency calls as was the situation here. They rely upon section 8½, as added by St.1929, p. 509, as amended by St.1931, p. 2101, and section 120 of the Vehicle Act, as amended by St.1929, p. 539, as they then existed. Section 8½ defines an authorized emergency vehicle and section 120 provides that the provisions of the act regulating the speed of vehicles shall not apply to authorized emergency vehicles responding to emergency calls and then states "the provisions of this section shall not, however, relieve the driver of any authorized emergency vehicle, * * from the duty to drive with due regard

for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of the privileges declared in this section". Appellants concede that under section 120 of the Vehicle Act a municipality is not liable for ordinary negligence of an authorized emergency vehicle, but contend that the driver of the police car in this case was not operating it with due regard for the safety of all persons using the highway and was driving it in an arbitrary manner in that the car was driven through the stop sign without any siren or warning given until too late to avoid a collision with the plaintiffs who were lawfully entering the intersection.

Appellants contend, therefore, that the municipality is liable for negligence of its emergency vehicles when driven arbitrarily.

Respondents rely principally upon *Armas v. City of Oakland*, 135 Cal.App. 411, 27 P.2d 666, 28 P.2d 422, which case was repudiated by *Lossman v. City of Stockton*, 6 Cal.App.2d 324, 44 P.2d 397; *Rogers v. City of Los Angeles*, 6 Cal.App.2d 294, 44 P.2d 465, and later by *Raynor v. City of Arcata*, Cal.Sup., 77 P.2d 1054.

[2] Since the trial of the case at bar the Supreme Court of California has clarified the apparent confusion that existed with reference to the effect of sections 8½ and 120 of the Vehicle Act upon the liability of a municipality for negligence of its authorized emergency vehicles responding to an emergency call. In *Lucas v. City of Los Angeles*, Cal.Sup., 75 P.2d 599, decided in January, 1938, the court has upheld the doctrine contended for by the appellants in this case, namely, that a municipality is liable for negligence of its authorized emergency vehicles responding to an emergency call when the operator has made an arbitrary exercise of the privileges granted him by the Vehicle Act, and that the failure to sound his siren or give warning of his approach would be considered such an arbitrary action. After exhaustively reviewing the history of the legislation upon the subject and the cases which have heretofore been decided, including the *Armas*, *Rogers* and *Lossman* Cases hereinbefore cited, the court says (page 604): "Our conclusions from the foregoing are that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable

for injuries to another, *unless the operator has made an arbitrary exercise of these privileges*. In such cases speed, right of way, and all other 'rules of the road' are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, *whether there was an arbitrary exercise of these privileges*." (Italics ours.)

The *Lucas* Case supports the doctrine of the *Armas* Case to the effect that section 1714½ of the Civil Code does not apply to authorized emergency vehicles responding to an emergency call, so far as general traffic regulations relating to the operation of motor vehicles generally is concerned. But the *Armas* Case did not purport to hold that the municipality should be protected where the driver of the emergency vehicle has been guilty of an arbitrary exercise of his privileges and the *Lucas* Case, besides definitely holding that the municipality is liable for negligence caused by the arbitrary exercise of these privileges, goes on to clear up the confusion which it says exists as to the meaning of the expression "arbitrary exercise of the privileges" as used in section 120, Vehicle Act. A mere reading of the decision shows conclusively that a failure to sound the siren would constitute an arbitrary exercise of the privileges, which arbitrary exercise the act forbids. The decision states (page 602), "Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence" to the emergency vehicle. "* * * If his" (that is, the driver of the emergency vehicle) "'due regard' for the safety of others means that he should, by *suitable warning*, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended". (Italics ours.) At page 603, the court states that an instance of arbitrary exercise of privileges would be "where the operator has given the required warning but sees that another has not heard or heeded it; under those circumstances it might be an arbitrary exercise of the privileges to continue on into an inevitable collision". Surely if such an instance would constitute arbitrariness it could not be contended that running into

an intersection where there was traffic, without sounding the siren, was not being arbitrary. The court further calls attention to the fact that under section 132 of the Vehicle Act, as amended by St.1929, p. 542 (now sec. 554, St.1935, p. 187) it is the sounding of the siren which relieves the driver of negligence. "The giving of the signal is the measure of care on his part, and if this is done his duty of care is performed, subject to the limitation as to 'arbitrary' conduct." It will be here noted that even if he gives the signal his conduct must not be arbitrary, and it necessarily follows that if he does not give the signal he is acting arbitrarily and is not relieved from negligence. While section 132 of the Vehicle Act is not as clear as the present section 554, on the requirement of the sounding of the siren as a prerequisite to relief from negligence, it certainly is clear from it and section 120 and the decision in the Lucas Case that failure to sound the siren, as in the case at bar, until too late for plaintiffs to yield the right of way, would constitute an arbitrary exercise of the driver's privileges. This rule is definitely established by the case of Raynor v. City of Arcata, Cal.Sup., 77 P.2d 1054, hereinafter referred to.

[3] The decisions in the Lucas and Raynor Cases make it unnecessary to analyze the cases cited by the parties and amicus curiae. In the Lucas Case, page 603, the court holds that the effect of section 120 is that when the public is made liable only in cases of arbitrary conduct on the part of the operator, it is relieved from ordinary negligence, and that where the question of arbitrariness is involved, an issue of fact is raised, "similar to that involved under the last clear chance doctrine; the negligence of the operator of the emergency vehicle would then rest solely upon his arbitrary exercise of his privileges and not upon his disregard of the ordinary speed and right of way restrictions".

[4,5] In April of this year the Supreme Court still further clarified the law as to negligence in the operation of emergency vehicles in the case of Raynor v. City of Arcata, 77 P.2d 1054. That case particularly answers one of the contentions made in this case, namely, that a city cannot be held liable for *any* act of an officer or employee driving an emergency vehicle in response to an emergency call for the reason that chapter 263 of the Statutes of 1929, page 568, provides that such

employee or officer himself cannot be held liable. After calling attention to the fact that section 1714½, Civil Code, was approved by the governor on the same day as said chapter 263 and after reviewing all cases heretofore passing upon the effect of said chapter 263, which cases are in conflict on the question whether a public employer may be held liable for "negligent operation" of a police or fire department under section 1714½, Civil Code, when the operator is free from liability himself under chapter 263, which cases include all of those cited by respondents and the amicus curiae here, the court holds, page 1058, that "it is a well-recognized rule that statutes upon the same subject-matter should be read together and each given full force and effect as far as possible". It then goes on to hold that under such rule it is manifest that the legislature did not intend to release the governmental agencies for the negligence of its operators, even though it did relieve the individuals themselves from such liability and says, page 1059, "the liability of the city or other public employer still rests on the doctrine of respondeat superior. In order that the public employer may be held, there must be a 'negligent operation' of the vehicle by the employee. The fireman or policeman responding to an emergency call is relieved of personal liability for his negligence, but the city may be held therefor. It follows from the discussion in the earlier part of our opinion herein that there is a 'negligent operation' of an authorized emergency vehicle responding to an emergency call only *where the driver of such vehicle fails to give a timely warning, or otherwise makes an 'arbitrary exercise' of the exemption from rules of the road which can be said to be willful misconduct.*" (Italics ours.)

[6] The Supreme Court decisions in the Lucas and Raynor Cases, supra, leave no room for question concerning the law as to the operation of emergency vehicles and as said in the Raynor Case, page 1057, although the decisions are rendered after the trial of the action herein, said decisions are declaratory of existing law applicable when the accident herein occurred. The effect of said decisions is to settle the law, which theretofore had been in a state of confusion due to conflicting appellate court decisions.

[7] In this case, there being evidence that the driver of the emergency vehicle failed to give warning until too late for

other traffic at the intersection to yield the right of way, the jury should have been permitted to decide that question and the nonsuit should not have been granted. Undoubtedly, had the trial been had since the rendition of the Lucas and Raynor decisions, *supra*, the lower court would not have granted the nonsuit.

Judgment of nonsuit reversed and cause remanded for a new trial.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



27 Cal.App.2d 10

PETERS v. SACRAMENTO CITY EMPLOYEES' RETIREMENT SYSTEM

et al.

Civ. 6022.

District Court of Appeal, Third District,
California.

June 6, 1938.

Hearing Denied by Supreme Court
August 4, 1938.

1. Municipal corporations Ⓒ200

That fireman died of coronary sclerosis would not defeat wife's right to pension, if exertion in fighting fire precipitated death. St.1935, pp. 2512, 2516, §§ 168, 173(a, b, e).

2. Evidence Ⓒ574

Whenever the subject under consideration is one within the knowledge of experts only, and it is not within common knowledge of layman, the expert evidence is conclusive upon the question in issue.

3. Municipal corporations Ⓒ200

Where physicians testified that exertion in fighting fire contributed to death of fireman as result of coronary sclerosis and there was no contrary evidence that extra exertion did not accelerate or aggravate the pre-existing heart disease, finding of retirement board that extra exertion did not accelerate or aggravate pre-existing heart disease was contrary to undisputed facts and arbitrary, and would not justify refusal to grant widow amount of pension authorized in case where fireman's death results from injuries received in performance of his duties. St.1935, pp. 2512, 2516, §§ 168, 173 (a, b, e).

4. Mandamus Ⓒ72

Generally, mandamus does not lie to compel public official to exercise his discretion in any particular manner, but where law imposes specific duty and he whimsically or arbitrarily refuses to perform those duties, or his refusal to perform is based upon erroneous conclusion of legal duties, or the right of the individual is so fixed that refusal of official act is clear abuse of discretion, mandamus is the proper remedy.

5. Municipal corporations Ⓒ200

That fireman died of heart disease by reason of exertion in fighting fire would not defeat wife's right to pension as against contention that duties required performance of such acts and they were such as usual and customary in line of his duty. St.1935, pp. 2512, 2516, §§ 168, 173(a, b, e).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition by Elizabeth M. Peters for a writ of mandate requiring Sacramento City Employees' Retirement System and others to pay petitioner as widow of William A. Peters, a fireman in the employ of the city of Sacramento at time of his death, a pension as provided by the charter of Sacramento. From a judgment granting petitioner a peremptory writ of mandate, defendant appeals.

Affirmed.

Hugh B. Bradford, City Atty., of Sacramento, for appellant.

George L. Popert, of Sacramento, for respondent.

PER CURIAM.

This is an appeal from a judgment granting to petitioner a peremptory writ of mandate requiring respondents to pay to her as the widow of William A. Peters, a fireman in the employ of the city of Sacramento at the time of his death, a pension equal to one-half of the monthly salary paid decedent at the time of his death based upon the finding that the deceased met his death "as the result of injuries received in the performance of duty" as provided by section 173(e) of the charter of Sacramento. Stats.1935, pp. 2511, 2516.

A hearing was had before the retirement board, which found that the deceased died solely as the result of a heart affliction, and under the provisions of section

173(a) and (b) allowed petitioner two-thirds of one-half of the monthly salary.

A transcript of the proceedings, which contained all the evidence taken by the board, was introduced in evidence before the trial court, and it devolved upon that court to determine whether petitioner was bound by the conclusions of the retirement board. Respondent claims that the evidence was such that the board exercised a legal discretion in its determination, and that its findings are conclusive. In this connection respondent relies upon the provisions of section 168 of the charter, reading as follows:

"* * * The Retirement Board shall be the sole authority and judge, under such general ordinances as may be adopted by the City Council, to determine when members may receive and may continue to receive benefits of any sort under the Retirement System, and shall have exclusive control of the administration and investment of such fund or funds as may be established, provided that all investments shall be of the character legal for insurance companies in California."

The essential facts are undisputed. William A. Peters was a captain in the Sacramento Fire Department. An alarm of fire rang in at 11:23 p. m. Captain Peters and his crew responded, and upon arriving at the scene of the fire Peters took over the usual duties required by his position. One witness testified he saw Peters coming from the rear of the house "and he was running toward the front to direct his men back to the line on one side of the building. * * *

Mr. Boothby, a battalion chief, testified it was the duty of a captain to cover fires and lead off lines into the burning building. In this case the witness saw Captain Peters leading a line of inch and one-half hose into the rear of the building. Another witness testified he saw Peters pulling hose from the back of the engine and saw him struck by a coupling, knocking off his cap. Shortly thereafter as he was working with his men and walking toward the truck, he fell to the pavement striking his head on the rear of the truck. He was immediately taken to the hospital, but died before the ambulance reached its destination. An autopsy was held, and the finding was "death as a result of coronary sclerosis, left coronary artery occluded."

Petitioner called two physicians to give their opinions as to the effect of Peters'

activity in fighting the fire in view of the fact that at that time he had coronary sclerosis. The respondent called no medical men, relying on the testimony of the two doctors called by petitioner.

Dr. Thomas testified that in coronary sclerosis the exciting causes are always looked for, and that any factor which excites or adds major stress or strain is a factor that may cause death in coronary sclerosis. Asked if from the facts in this case he thought exertion or excitement was a contributory cause of death, the doctor replied that he felt definitely that it did.

Dr. Louis J. Gouget testified that it was very likely that the exertion during the fire contributed to the death of Peters, and in his opinion the exertion at the fire resulted in the death of Peters.

In discussing this case upon the foregoing facts, Judge Glenn rendered an opinion from which we quote and adopt the following as the opinion of this court:

"A recent case (*Buckley v. Roche*, 214 Cal. 241, 4 P.2d 929) very similar by analogy to the instant case was decided by the Supreme Court of this state wherein the widow was claiming the right to a pension by reason of the death of her husband while in the performance of his duty as a policeman of the City and County of San Francisco. He had a heart affliction for some time prior to his death, which at times had caused him to temporarily retire from active duty. His duties forced him to climb a flight of stairs, and shortly after having climbed the stairs he suffered a heart spasm from which he died within a few hours thereafter. In the course of the opinion the court states: 'The fact that Buckley had at the time a previous heart affliction did not of itself defeat his wife's application for a pension if the exertion in climbing the stairs precipitated his death by aggravating this condition. Under these conditions the injury was such as would bring it within the terms of the charter and entitle his widow to a pension in case of his death from said injury. This principle has frequently been applied in cases arising under the Workmen's Compensation Act, St.1913, p. 279, and we can see no distinguishable difference from such cases and those arising under said charter. The leading case to be found upon this subject is from the Supreme Judicial Court of Massachusetts, where

it was held that "Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act." In *re Brightman*, 220 Mass. 17, 107 N.E. 527, 528, L.R.A.1916A, 321. That case was followed by this Court in the decision of the case of *G. L. Eastman Co. v. Industrial Accident Comm.*, 186 Cal. 587, where this court on page 594, 200 P. 17, on page 20, said: "If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." In the *Eastman Case* we also (page 597, 200 P. page 21) quoted with approval the following language from the case of *In re Madden*, 222 Mass. 487, 111 N.E. 379, L.R.A.1916D, 1000: "'It is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting on a healthy employee.' Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it.'" *Buckley v. Roche*, *supra*. The case also cites with approval *Knock v. Industrial Accident Comm.*, 200 Cal. 456, 253 P. 712, and *Fogarty v. Department of Industrial Relations*, 206 Cal. 102, 273 P. 791. In approving the *Knock Case* the court not only followed the *Eastman Case*, 'but it set aside the order of the Commission denying an award to the dependents of *Knock* as being contrary to the undisputed evidence in the case'. And in commenting on the *Fogarty Case* it states that the court in that case annulled the order of the commission denying an award in favor of the dependents of *Fogarty* on the ground that the uncontradicted evidence before the commission showed that the employment of *Fogarty* precipitated or accelerated his death.

"Respondents herein claim that the *Buckley Case*, *supra*, is not an authority in this proceeding for the reason that there it was stipulated that (4 P.2d page 930) 'while in said photograph gallery, *Buckley* suffered a heart spasm from which in a few hours thereafter he died. Said heart spasm resulted from the exertion incident to the stairway ascension.'

Thus it is argued that by stipulation it was agreed that the heart spasm resulted from the exertion of climbing the stairway, while in the present proceeding it is claimed by respondents that whether or not *Peters* suffered a heart spasm as a result of his exertions while fighting the fire is a disputed question; and, furthermore, respondents make the point that even though this be true, still it must appear that *Peters* was under some extraordinary strain or stress not ordinarily incident to his duties. The further claim is made that the evidence was conflicting, and hence the retirement board properly exercised its discretion, and that according to the charter, its conclusion is final. These questions will be disposed of as I proceed.

[1, 2] "It is the view of this court that there was no substantial evidence opposing that produced by petitioner herein, and hence the case is on a par with the *Buckley Case*, and also if such be the fact, then there was no testimony upon which the retirement board could exercise a discretion. It is true that the autopsy surgeon found that deceased died from coronary sclerosis and his left coronary artery was occluded; but this fact does not conflict with the testimony of the experts given at the hearing. The fact that he had such a heart affliction was the basis for their conclusion that the exertion and stress of fighting the fire was the cause of the heart spasm or collapse of the coronary artery. Respondents take the position that because it appears from the medical testimony that one suffering from such an affliction might suffer death without any extra exertion, this fact justified the retirement board in concluding that the extra exertion did not accelerate or aggravate the pre-existing heart disease. But in answer to this, as before stated, the only evidence is to the contrary. No medical testimony to the contrary was introduced; and in cases of this character it is imperative to rely upon the testimony of those skilled in the science concerning which they are called upon to express an opinion, and their conclusion is conclusive on the question. Thus in *Simpson Construction Co. v. Industrial Accident Commission*, 74 Cal.App. 239, 240 P. 58, it was held that (page 59) 'whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue'. Cited with approval to

the point in *Newton v. Industrial Acc. Comm.*, 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279. The case of *Winthrop v. Industrial Accident Commission*, 213 Cal. 351, 2 P.2d 142, is a much stronger case on the facts against the allowance of a claim for an industrial injury than are the undisputed facts in this case, for in that case one of the doctors testified as to his opinion based upon pre-operative symptoms only while other doctors testified from personal observations and examination, and the court held that such testimony by the doctor who had based his opinion only on pre-operative symptoms *did not create a conflict in the evidence*. The order denying compensation was annulled on certiorari. The theory, of course, was that the evidence so given was not substantial and hence insufficient to create a conflict. There being no conflict the industrial board has no discretion to exercise, its sole duty being to make an allowance according to the facts. Again, in the case of *Nielsen v. Industrial Acc. Comm.*, 125 Cal.App. 210, 13 P.2d 517, although the industrial accident commission denied compensation, the court held that the evidence upon which it acted did not present a substantial conflict. In that case the family physician was present at the autopsy. He testified that the deceased had 'coronary and aortic sclerosis and the aorta was acutely dilated, being covered with numerous small red hemorrhages and broken capillaries'; also 'that "the dilation had ruptured many of these fine blood vessels and that the rupturing had been very recent. I am convinced in my own mind that the heavy lifting caused an increased pressure in the blood stream, which the degenerated aortic wall could not withstand; this produced an acute dilatation and death."' [Court's italics.] The autopsy surgeon at the inquest reported "arterio-sclerosis, hemorrhages and dilatation of the aorta". It appeared that the family physician had known the deceased for several years immediately prior to his death and that he had never displayed or complained of poor health or illness and that he had not known of anything abnormal in his physical condition. The wife testified substantially to the same effect. On the other hand, another doctor 'without any examination of the deceased and without a full knowledge of the facts found at the autopsy', gave his opinion that death was caused by coronary occlusion, and was not caused by the exertion of the employment. Likewise another doctor, under the same lack of examination and full facts, ex-

pressed the same opinion as the doctor last referred to had. Another physician, called by the commission, reviewed the entire record and expressed the opinion that the pre-existing disease was the major factor in the case, but that the extra exertion and the testimony of the physicians who actually saw and performed the autopsy could not be disregarded. The court reviews the cases on the subject, and annulled the order of the commission. Therefore, notwithstanding the testimony of the two physicians who gave the opinion in that case that death was not caused by the extra exertions of deceased immediately before his death, nevertheless, for the reasons stated, such evidence was insufficient upon which to find that a conflict existed, and the order of the commission as stated, was annulled.

[3, 4] "The above cases indicate that there being no substantial evidence to support the conclusion reached by the retirement board, it had no facts upon which to base the conclusion reached, hence it exercised no discretion, and having acted contrary to the undisputed facts its act is treated and considered as arbitrary. In *Hartsock v. Merritt*, 94 Cal.App. 431, 271 P. 381, the court states: 'The general rule is that mandamus does not lie to compel a public official to exercise his discretion in any particular manner, but where the law imposes upon him specific duties and he either whimsically or arbitrarily refuses to perform those duties, or where his refusal to perform is based upon an erroneous conclusion of his legal duties, or where the right of the individual is so fixed that the refusal of the official act is a clear abuse of discretion, mandamus is the proper remedy.' In *Tulare Water Co. v. State Water Commission*, 187 Cal. 533, 202 P. 874, it was held (syllabus) 'Mandamus is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act creating the State Water Commission.' There are many cases where the court has given relief where the action of the board or tribunal has been founded upon unsubstantial testimony which was insufficient upon which to base a finding even though the board or tribunal was vested with discretionary authority. The principle is too well established to require further citations of authorities.

[5] "The final contention made by appellants is that even though it be established that Peters died by reason of exertions in fighting the fire, yet if his duties required the performance of such acts, and they were

such as was usual and customary in the line of his duties, no recovery can be had. The cases cited by respondents do not justify such conclusion. If this were the law, then the court erroneously decided the Buckley Case, *supra*, as well as most of the other cases referred to above."

The judgment is affirmed.



26 Cal.App.2d 710

FITZPATRICK v. CLARK.

Civ. 11430.

District Court of Appeal, Second District,
Division 1, California.

June 3, 1938.

Rehearing Denied July 1, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

I. Trial ⇨243

In action for alienating affections of plaintiff's husband, instructions fully instructing jury and including definition of "malice" as defined by Penal Code and informing jury of improper motives, evil intent, wrongful acts, and unlawful influence, all of which were necessary to recovery, was not objectionable as being in conflict with instruction embodying general definition of "malice in law" and as permitting recovery of exemplary damages without finding of evil intent on part of defendant toward plaintiff. Civ.Code, § 3294; Pen.Code, § 7, subd. 4.

2. Trial ⇨296(2)

Where jury in action for alienation of affections of plaintiff's husband were fully instructed upon "malice in fact" as defined by Penal Code, and other elements necessary to recovery of punitive damages, instruction giving a broad and general definition of "malice in law," if erroneous, was harmless. Civ.Code, § 3294; Pen.Code § 7, subd. 4.

3. Husband and wife ⇨334(3)

\$22,500 for alienating affections of plaintiff's husband held not excessive.



Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Christine Fitzpatrick against Thelma Clark, also known as Mrs. William

A. Clark, III, for alienation of affections of plaintiff's husband. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Eugene Kelly, of Los Angeles, for appellant.

William M. Rains, of Los Angeles (Albert L. Denney, of Los Angeles, of counsel), for respondent.

YORK, Presiding Justice.

The respondent brought this action against appellant alleging that the latter had alienated the affections of respondent's husband. The case was tried before a jury which returned a verdict in favor of respondent for \$30,000. Judgment was duly entered upon such verdict and thereafter an order was made granting a motion for new trial unless the respondent filed a remission of \$7,500 of said judgment. Such remission was made and the judgment reduced to the sum \$22,500, whereupon the order of the court denying the motion for a new trial was filed and entered.

Special interrogatories submitted to the jury were answered as follows:

"Special interrogatory No. 1. If your verdict is for the plaintiff in this action then, and only in that event, I instruct you to answer the following question: (1) Do you find that plaintiff is entitled to exemplary damages? Answer: Yes. (2) If your answer to the foregoing question is 'Yes', then what amount, if any, have you allowed in your general verdict as exemplary damages? Answer: \$15,000.00. * *

"Special interrogatory No. 2. If your verdict is for the plaintiff then, and only in that event, I instruct you to answer the following question: (1) In her conduct with Michael W. Fitzpatrick was Thelma Clark guilty of malice toward plaintiff? Answer: Yes."

Appellant here urges that "it was error for the court to instruct the jury that it could award punitive damages if it found that defendant acted with malice and then define malice in two succeeding contradictory instructions, the first of which was a definition of malice in fact and the second a definition of malice in law". Appellant also contends that "the judgment of \$11,250 punitive damages is not supported by any substantial evidence and, in any event, is excessive", and that "the verdict for \$22,500 is excessive".

The instructions which appellant claims were contradictory and the giving of which prejudicially affected her substantial rights are as follows:

(1) The instruction referred to by appellant as "defendant's No. 22" which was given at the request of appellant: "I instruct you that malice, as used in these instructions, means not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. The words malice and maliciously import a wish to vex, annoy or injure another person which may be established either by direct proof or presumption of law. Of course, the phrase 'direct proof' as here used, means both testimony of eye witnesses and circumstantial evidence, that is, it means either or both of them."

(2) The instruction referred to by appellant as "plaintiff's No. A" which was given at the request of respondent: "Malice in its legal sense, means an intentional doing of a wrongful act toward another without legal justification or excuse or, in other words, the unlawful violation of a known right."

Appellant claims that instruction No. 22 is a definition of malice in fact, while instruction No. A is a definition of malice in law; that they are contradictory and in effect presented two entirely different theories of malice to the jury; and that while instruction No. A will support compensatory damages only, it was one of two contradictory definitions of malice upon which the jury was required to deliberate in awarding punitive damages.

As defined by section 7, subdivision 4, of the Penal Code: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." This definition is included in appellant's instruction No. 22, and in referring to such definition, the court in the case of *Davis v. Hearst*, 160 Cal. 143, at page 160, 116 P. 530, at page 538, said:

"* * * we shall, for the purposes of this discussion, define malice as it is defined by section 7 of the Penal Code—a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. We shall call this 'malice in fact.' We shall bear in mind that it may be established either by direct proof of the state of mind of the person, or by indirect evidence so satisfying to the

jury that they may from it infer and find the existence of this malice in fact.

"We shall define 'malice in law' as being that malice which the law presumes (either conclusively or disputably) to exist upon the production of certain designated evidence, which malice may be fictional and constructive merely, and which, arising as it usually does from what is conceived to be the necessity of proof following a pleading, which in turn follows a definition, is to be always distinguished from true malice or malice in fact."

In *Ross v. Sweeters*, 119 Cal.App. 716, at page 724, 7 P.2d 334, at page 338, it is stated: "* * * what is known as malice in fact, as distinguished from malice in law, must exist before punitive or exemplary damages can be given."

The right to recover punitive damages arises solely by virtue of section 3294 of the Civil Code, to-wit: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Appellant recites in her brief five instructions, including the two above quoted, which she claims allowed the jury to find malice and hence punitive damages, without ever finding that appellant had any evil intent toward the respondent. However, appellant apparently overlooked the following instruction bearing upon the subject of malice and improper motives, which was given to the jury at her own request, to-wit:

"In an action of this kind a material point of inquiry is the intent with which the defendant has acted. It must appear that the defendant has acted from improper motives. A charge of alienating the affections of a husband from his wife is not sustained if it appears that before the defendant acted at all the husband entertained no affection for his wife, and that his actions toward her were the result of his own sentiments instead of being caused by any persuasion or inducement of the defendant. Unless you find that the defendant, Thelma Clark, acted from improper motives, your verdict must be for the defendant. If you find that before defendant acted at all plaintiff's husband, Michael W. Fitzpatrick, entertained no affection for his wife, and that his actions toward her were the result of his

own sentiments instead of being caused by any persuasion or inducement made to him by Thelma Clark, then you must find for the defendant."

[1,2] It is apparent from a perusal of all the instructions which were given that the jury was fully informed upon all the various phases of the case including malice in fact, as defined by section 7 of the Penal Code, improper motives, evil intent, wrongful acts and unlawful influence, all of which were necessary elements to a recovery by respondent in an action of this character. Taking into consideration all of the facts and circumstances presented by the instant action, this court cannot say that the jury was misled by respondent's instruction No. A, or that it would have arrived at a different verdict had the very broad and general definition of malice in law, as outlined in instruction No. A, not been given. If any error attached to the giving of that instruction to the jury, it was entirely harmless and insufficient to have prejudicially affected appellant's rights.

[3] The evidence supports the jury's verdict for punitive damages. The award for punitive and compensatory damages reduced by the trial court, as hereinbefore set out, is not so excessive as to shock the sense of justice and raise the presumption that it was the result of passion and prejudice on the part of the jury.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.



26 Cal.App.2d 664

HUBBERT et al. v. AZTEC BREWING CO.*

Civ. 2031.

District Court of Appeal, Fourth District,
California.

June 2, 1938.

As Corrected June 25, 1938.

Rehearing Denied June 28, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

I. Appeal and error ⇐934(1)

In reviewing judgment non obstante veredicto rendered in favor of defendant, reviewing court was required to resolve every real conflict in evidence in plaintiffs' favor

80 P.2d—12½

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and allow them benefit of every inference that might legitimately be drawn, regardless of side introducing evidence on which it was founded.

2. Judgment ⇐199(3)

A judgment non obstante veredicto is in order when motion for directed verdict, which should have been granted, has been denied, and a verdict rendered against moving party. Code Civ.Proc. § 629.

3. Negligence ⇐122(1)

Every one is presumed to have used reasonable care for his own safety.

4. Negligence ⇐122(1)

The presumption that one has used reasonable care for his own safety is evidence and may in certain cases outweigh even positive evidence produced against it.

5. Explosives ⇐7

In action for death resulting from an explosion, presumption that deceased used reasonable care for his own safety did not impute negligence to defendant, and plaintiffs had burden of establishing defendant's negligence and that such negligence was proximate cause of explosion.

6. Explosives ⇐7

In action for wrongful death of deceased resulting from an explosion on defendant's premises, defendant's negligence and contention that negligence was proximate cause of explosion could be established by circumstantial evidence.

7. Negligence ⇐121(2)

Where thing causing injury complained of is shown to be under management of defendant or his servants, and accident is such as in ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of care.

8. Negligence ⇐121(2)

The mere fact that an accident has occurred does not of itself create an inference of negligence as against a defendant.

9. Negligence ⇐121(2)

To justify invocation of the rule of res ipsa loquitur, the instrumentality which caused injury must have been under exclusive management of defendant.

10. Evidence ⇐597

Where jury, in reaching verdict for plaintiffs who have relied upon doctrine of res ipsa loquitur, must necessarily have bas-

*Rehearing denied 80 P.2d 1016.

ed one inference on another until determination as to presence of circumstances upon which doctrine of *res ipsa loquitur* is based constitutes nothing more than a mere guess, verdict is not supported by substantial evidence.

II. Explosives ☞7

Judgment ☞199(3)

In action for death in an explosion of employee of independent contractor performing services in water-proofing vats in defendant's brewery, evidence was insufficient to support verdict for plaintiffs under *res ipsa loquitur* doctrine on theory that explosion resulted in vat in defendant's control because of presence of highly flammable substances on premises, and trial court properly granted judgment *non obstante veredicto*, where it was not shown that flammable substances had been used on day of explosion at vat where explosion occurred, or that any of defendant's employees were working there. Code Civ.Proc. § 629.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Maude Hubbert and another against the Aztec Brewing Company to recover for the death of Leo H. Hubbert, who died of burns resulting from an explosion on the premises of the defendant. Judgment for defendant, and plaintiffs appeal.

Judgment affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellants.

Mathes & Sheppard, of Los Angeles, and Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

HAINES, Justice pro tem.

Plaintiffs and appellants here are the widow and son of Leo H. Hubbert, who, as well as one Cerezo, died of burns consequent on an explosion on the premises of defendant and respondent, Aztec Brewing Company, in San Diego, on August 8, 1935. Respondent is engaged in the business of manufacturing and brewing beer. Its plant includes a vat building in which is an extensive cellar known as cellar "G", which is considerably longer from east to west than it is wide from north to south. In this cellar there are 29 reinforced concrete vats, approximately square in ground plan and about 12 feet by 12 feet each in size, arranged in rows, with aisles between the rows, and in some instances aisles also between rows of

vats and the walls. Each vat has an opening, consisting of a manhole sufficiently large for a man to crawl through, at the side of the vat, about 3 feet above the floor of the adjacent aisle or corridor. There are no other openings into the vat except such as are required for the penetration of pipes and refrigerating equipment. The most northerly of these rows of vats consists, in order from west to east of vats 13 to 24, both inclusive. This row is broken only by a cross aisle or corridor between vats 18 and 19. There are, however, further aisles or corridors between this row of vats and the north wall of the cellar and also along the west wall of the cellar, and also between the row of vats just referred to and the next row of vats to the south, which is, going from west to east, made up of vats 12, 11, 10, 9, 8, and 7, and after the interruption of a widened continuation of the cross aisle above referred to, by further vats numbered 29, 28, 27, 26 and 25. Vat 13 is thus just north and across the intervening aisle or corridor from vat 12 and, similarly, vat 14 is north across the same corridor, and opposite vat 11, which in its turn is just east of vat 12. It is upon this last aisle or corridor that the manholes of the vats which line it open.

The method adopted for water-proofing vats was first to "prime" their interiors with asphalt, which was then to be "cut back" with some liquid or solvent applied to the walls, after which the walls were mopped with melted asphalt, and, lastly, an asphalt material known as "brewer's pitch" was applied in sheets to the walls, and the seams between the sheets welded together. A binder had to be spread upon these sheets of "brewer's pitch" to enable them to be made fast to the previously applied coats of material. This binder was heated and prepared on a gas plate or stove fueled with bottled gas. Such a gas plate or stove was found in the aisle last referred to after the explosion. In some vats other water-proofing material was applied as a preliminary to the use of any asphalt.

Respondent, in April, 1935, contracted with one A. O. Miller, doing business as the A. O. Miller Water Proofing Company, to prime and mop-coat 22 of the vats, saying in its order to Miller: "We will furnish material for mop-coat and prime coat and charge you for solvent used in prime coat." It was respondent's purpose to itself do the work of applying the final coat of "brewer's pitch" which is about ½ inch thick and was prepared in its own laboratory by its

own chemist. The work contracted for with Miller went on intermittently for some months after the arrangement with him, respondent carrying out the work of applying "brewer's pitch" within vats within which the preliminary part of the water-proofing work had been from time to time completed by the Miller Company at a proper interval after the completion of such preliminary work on a given vat.

Leo M. Hubbert was employed by Miller to carry out the work which the latter had contracted to do, on the basis of a daily wage plus a share in the profits. Cerezo was another employee of Miller who worked with Hubbert. On the morning of the accident the two were in cellar "G" for the purpose of proceeding with the work. About the middle of the morning an explosion occurred in vat 14 of sufficient violence to break a hole about 6 feet in diameter in the concrete top of the vat, leaving the reinforcing steel exposed, to cause a "V" shaped bulge in the vat wall opposite the manhole and to cause a bulging and buckling in the walls common to vat 14 and vat 13 and to vat 14 and vat 15.

There is a good deal of discussion in the briefs about where the decedents Hubbert and Cerezo were at the time of the explosion. An employee of respondent brewery, one Falkenberg, testified that just before it occurred he had been working in vat 13 cleaning a door but left immediately prior to the explosion; that in the morning something like ten of the brewery's employees were working inside of the vats, but he saw nobody there when he left except the deceased Hubbert, who was "out in the hallway just outside a tank" (vat), though he could not be sure just what he was then doing. He did not then see Cerezo. This, however, as we shall hereinafter notice, was by no means all that Falkenberg had to say. Another of respondent's employees, one Moir, an assistant electrician, testified that just before the explosion he was going west in the aisle or corridor herein last referred to, which was lit up by ceiling lights, between the two rows of vats, one of which, as we saw, included vats 13 and 14 with others, and the other, as already stated, vats 12 and 11 with others. He was hunting for a ladder that was at the extreme west end of this aisle in order to use it in installing two temporary drop cords at the opposite or east end of the same aisle or corridor. He testified that, as he proceeded westerly along the aisle, he saw Hubbert leaning on the manhole of vat 12 which was

then open, and that he noticed that the inside of the vat was lighted. Moir laid his drop cords down on the floor, took a beer hose off the ladder, and was stooping down and about to pick up the drop cords again when the explosion occurred. Moir said that the fire, following the explosion, was east of where he then was and right in his face when he looked in that direction, a sheet of fire, in the aisle along which he had come. He tried to escape in some other direction. He first turned south in the corridor that ran along the west wall of the cellar but found some obstruction and so turned around and went on north along the west side of vat 13 to the northwest corner of the cellar. Thence he turned east in the corridor along the north wall with vats 13 to 18, both inclusive, to the south of him. Finding his path again obstructed he turned back west and met Hubbert, who said: "I am done for" and addressed Moir as "Shorty", apparently mistaking him for Cerezo, who went by that name. Hubbert's clothes were on fire and Moir helped him off with them, and, being cut off from escape, the two remained in the corridor just north of vat 16 for about three quarters of an hour, when the fire department arrived and cut a hole in the roof through which they got out. Moir's hands and face were burned but, according to the fire chief, Hubbert was burned from head to foot.

Respondent's master mechanic and plant superintendent, Jaeger, having been informed of the explosion, went to the vat building and into the cellar and found Cerezo in the center of a "hallway" about half way between vats 13 and 19. These vats are some distance apart in the same row and there are two aisles, as already noticed, one on either side of this row of vats, that is, the aisle along the north wall of the cellar where, as we saw, Hubbert and Moir took refuge and the parallel aisle next south of it. The "hallway" referred to in Jaeger's testimony was the more southerly one of these and the same on which, as we saw, the manholes of vats 12, 13, 14, etc., open. Jaeger says that from this aisle he and an employee of respondent named Boroff helped Cerezo out. Notwithstanding Cerezo's burns, his face was largely free from them. Cerezo's clothing was gone. Jaeger was under the impression that his shoes were gone too. One Herzog, the respondent's assistant general manager, testified that a pair of shoes was found in the aisle "just about at the division line between tanks 11 and 12". The witness Porter, an insurance man,

who visited the cellar shortly after the accident, says: "About here at approximately the division between" (vats) "11 and 12 was a pair of shoes. Between the manhole 11 and up beyond the shoes possibly two or three feet were fragments of clothing. There were some fragments of dollar bills on either side of the corridor." The shoes were identified by Cerezo's widow as the work shoes of her husband. The evidence shows beyond substantial dispute that the explosion occurred in vat 14, though the resulting fire burned in the aisle or hallway adjacent to it on the south, and various other parts of the cellar suffered a greater or less degree of damage.

Appellants' original theory was that Hubbert and Cerezo were working in or about vat 14 at or just before the time the explosion occurred. This theory would be unfavorable to their view of the case to the extent of tending to dispel the inference on which they rely that respondent brewing company was in the exclusive control of the agency that, whatever it may have been, caused the explosion, since, if Hubbert and his companions were working in vat 14, it might as readily be inferred that the explosion resulted from something done by them or one or the other of them. During the progress of the trial, however, on hearing Moir's testimony, appellants' counsel took the position that the evidence showed the vat in which the men who were killed were actually working not to have been vat 14 at all, but vat 12, and now contend that they had not, for weeks prior to the explosion, had anything to do with vat 14, from which counsel claim further that whatever agency caused the explosion, since the latter occurred in vat 14, such agency causing it must have been under the control of the brewery rather than of the Miller concern. Having sought and obtained leave to amend their complaint accordingly, they finally presented their case on this latter theory. A bill from the Miller concern to respondent dated May 15, 1935, and approved by respondent on May 20, 1935, was produced. This purported to be for priming and mopping tanks (vats) 5, 8, 10, 13, 14, 15, 19, 20, 21, 22, 23 and 24, but is inconclusive as to what particular ones of these vats were completed as to these priming and mopping coats since it specifies that 12 tanks (vats) were primed and mopped as to sides and bottom and 11 primed as to ceiling only. From this it might seem that on 11 of the vats no mopping coats had then been as yet applied to the ceiling and as to 1 vat neither prime nor mop coat applied

to the ceiling. However that may have been, the evidence, according to appellants' counsel, indicates that when the explosion occurred Hubbert was in the aisle opposite the manhole of vat 12, and Cerezo either in vat 12 or just on his way out of it, and that both were for the time cut off from escape to the east along the aisle that they were then in, by the fire to the east of them, which filled that aisle opposite the manhole of vat 14; that it was from this fire that they sustained their ultimately fatal injuries; but that after it had subsided Cerezo made his way east along the aisle where the fire had been to the point where he was found. We take it that their theory as to Hubbert's course must be that he finally reached the north aisle of the cellar in the same way that Moir testified that he had reached it.

The record exhibits no direct testimony as to the cause of the explosion in vat 14. Either, therefore, appellants made out a case for the jury under the doctrine of *res ipsa loquitur* or else they failed to make out one at all, and the trial court was right, notwithstanding the jury's verdict in their favor, in entering judgment for respondent. The transcript includes 944 pages of matter and it is manifestly impracticable in this opinion to recite the evidence in detail. The following, however, as we understand appellants' counsel, are, according to their construction of the testimony, the salient features in it, which, in addition to those which we have already mentioned, they contend render the doctrine of *res ipsa loquitur* applicable:

Hubbert and Cerezo were the only employees of the Miller concern in the cellar. All of the others who worked there were employed by respondent. There was nothing, according to appellants' claim, in the materials used by Miller's men that was inflammable. Miller testified that acetylene torches could not be used in the application of the priming and mop coats called for in his contract but that these coats could only be applied with brushes and mops. On the other hand, appellants direct our attention to evidence which, as they claim, shows that, "there were certain highly explosive materials which were owned and used by, and were under the exclusive management and control of defendant brewery company in the aisle in the immediate vicinity of vat 14". These are specified as bottled gas, acetylene, gasoline, solvent and kerosene,

with none of which, according to appellants' claim, did either of Miller's men have anything to do.

As respects the bottled gas, the testimony is chiefly that of Herzog who, as we saw, is respondent's assistant general manager. He said that there was in the aisle a container of bottled gas with a capacity of 100 pounds or possibly 20 gallons, used by respondent's men in handling gas torches. He thought, however, that the container was just about empty. It had been full when placed in the aisle and he did not, after the explosion, examine it. This aisle, however, extends the whole length of the cellar or between 100 and 150 feet, and our attention has not been called to any evidence indicating that this gas container was anywhere near vat 14. The evidence seems to be that it was in the aisle at the southeast corner of vat 18, which would place it something like 45 or 50 feet away from vat 14, and Herzog claims that respondent's men had not been using gas torches on the day of the explosion, though, so far as he was concerned, he was not in the cellar but in the office and, therefore, could not know positively that they did not. Jaeger testified that his men were putting on "sheets" in vats 17 and 18 which may argue, as appellants claim, that torches were on that day used in those vats, but both of these were at a distance from vat 14.

So far as the acetylene was concerned, the testimony of one Courser, the assistant fire chief of the city, who was on the ground just after the explosion, refers to two acetylene tanks "about opposite the staircase or stairway". This would, according to a floor plan known in the record as plaintiffs' exhibit 11, place them something over 50 feet to the east of vat 14. The type of tank is "a regular welding tank or acetylene * * * and combination oxygen". According to this witness, when he visited the cellar after the explosion, a hose ran out of the manhole in vat 14 easterly along the aisle and was connected to both of these tanks. The fire marshal, Newton, describes the tanks as "acetylene and oxygen tanks" but he thought that they were in the vicinity of vat 9 which, if true, would place them only from 12 to 15 feet from vat 14. He did not notice whether the tanks were turned on or not. Mr. Porter, the insurance man above mentioned, referred to these tanks as being "an acetylene

tank and an air tank" and said they were "tied together". One Trussing, who is a safety engineer for the Union Oil Company, and who examined the cellar a day or two after the accident, refers to these tanks as "one tank of dissolved acetylene and one tank of compressed oxygen" east of but very close to vat 14. Miller, who also examined the premises after the explosion, says that he "saw one acetylene torch tank and a gas tank".

As to gasoline, Fire Marshal Newton says that he noticed the black appearance of asphalt and a strong gasoline smell in an overturned can in the aisle at a position which, according to the floor plan, would be in front of the easterly part of vat 16, or a distance of possibly 20 feet from vat 14. This witness says that he also observed directly in front of the opening (manhole) in vat 14, an overturned bucket with the same kind of liquid and the smell of gasoline. The witness Trussing, who noticed this latter pail and said he critically examined it, stated that the upper part of the pail showed carbon, but that there was material in the pail in a liquid state and that to some extent the interior of the pail had been splashed with some white material. The liquid referred to was black and sticky and smelled of gasoline. The manhole of vat 14 was, according to Trussing, directly above the pail. The pail was "adjacent to the manhole within a few inches of it. The wall was smudged with smoke or carbon to a height of perhaps the height of my head. The smudge started above the pail and continued to about six feet in height."

Of the material known as Stoddard's Solvent, the witness Jaeger testified that the company kept on hand never over 10 gallons at a time and usually 5 gallons. This was purchased from the Union Oil Company. The 5-gallon can of the solvent, according to Miller, was seen by him in front of vat 7. This would, according to the floor plan, place it 40 feet more or less from vat 14.

Jaeger testified that respondent keeps kerosene on the premises in 50-gallon drums. Our attention is not called to any statement as to just where it is kept.

There is, of course, no doubt that the acetylene and oxygen tanks referred to were intended to provide for acetylene torches. These, as the evidence shows, were intended for use in the welding to-

gether of the sheets of "brewer's pitch" to be applied as the final step in the water-proofing of the vats. As respects gas torches, there is no dispute that it was respondent's practice to use them in softening the sheets of brewer's pitch to make easy their application to the mopping coat. In these torches, also, compressed air was used, this time in connection with gas. The process by which the appliance was conducted is thus described by the witness Jaeger.

"We had a one-inch pipe, manifold on the outside of the tanks, running the length of the number of tanks that work was to be done on, and at the junction of each tank at the intersection of either a thermometer well or, as we call them, 'swiggle', or 'trycock' valve, we had a valve and a 'T', and the gas connections were made through this thermometer well into this manifold."

The further process of bringing the gas into the vat, as described in the evidence is, we think, correctly epitomized in appellant's opening brief as follows:

"The valve and the gas line was in the close proximity of a pipe hole, into each vat. The hose would be attached to the valve and on the other end of the hose would be a torch; that is, the end of the hose that is inside the tank would have a combination gas and air torch on it. The process of using this blowpipe or torch is to 'turn on a needle valve on the gas line and then turn on enough air to make the mixture so that it gives a very small, even flame, to heat these sheets in the back, so they are pliable, so you can apply them to the wall. When the gas is turned on you have to light it'."

The compressed air for use in the gas torches was, according to Jaeger, "run directly from our reservoirs which are located on the roof of the engine room from 180 to 200 feet away from this cellar door". The compressed air is carried in a $\frac{3}{4}$ inch galvanized pipe line running along the outside of the rows of vats and tapped at each vat.

Upon producing a conflux of compressed air and bottled gas at the torch the manner of lighting the latter is to use a small wick, the wick being enclosed by a small piece of pipe. The wick is initially lit out in the aisle with a match and carries a flame about the size of a lead-pencil. It is customarily allowed to continue burning and is laid down on the temporary scaffolding within the vat between times when it is used to light torches, and remains there until the work-

men are ready to go out of the vat. The testimony is that bottled gas, with the right proportion of air, will explode on coming in contact with a flame. It is established beyond controversy that, after the explosion here involved, a number of burnt matches were found in an aisle in the neighborhood of vat 14. A package of "Wing" cigarettes, the brand said to have been smoked by Cerezo, was also found under some of the debris left by the explosion in this locality, together with some cigarette butts. One of appellants' theories as to what might have caused the explosion is that some of respondent's employees, at the time working in or about vat 14, might, on leaving for lunch, which seems to have been served in the establishment about 10 o'clock, have left a wick burning, which might have set off some escaping bottled gas as the latter became mixed with the right amount of air. Appellants' counsel call attention to "other instrumentalities than blow torches, wicks and matches", with which the defendant's employees may have set off the explosion. To these we will proceed to refer:

(a) One Gallagher, a deputy county coroner, visited the cellar on the afternoon of the day of the explosion and found a piece of lamp cord or wire, consisting of two strands fastened together, partly in vat 14 and partly extending through the manhole to the outside in and along the aisle. This cord or wire had an offshoot about $7\frac{1}{2}$ feet long. When found, it was badly charred, attached to nothing at either end, but had, at the inner end, some sockets and at the outer end, a plug from automobile equipment which was smaller than the regulation plug designed to fit into a regulation socket. Along the north line of the aisle which ran south of the row of vats 13 to 18, six and a half to seven feet above the concrete floor level, was a temporary electric line used not for power but for furnishing light to the vats, and there were sockets, also obtained from automobile equipment, in this line, into which the plugs attached to cords that were to run into the vats could be thrust. Nearer the sockets were pipe chases or holes penetrating through the vat walls through which the cords could be run, though, as just noticed, this particular cord was not in fact run through a chase but instead through the manhole. No pipes had yet been inserted in these holes or chases. The explanation of using the small automobile plug instead of standard equipment is that it could be thrust through nipples in the wall. The particular cord found by Gallagher was identified

by the witness Moir as his work and as looking like one of a half dozen that he had made under the order of respondent's chief electrician, though he does not remember the offshoot; and there is testimony that three or four such cords or wires had, previous to the explosion, been used by respondent's employees. The city of San Diego had adopted a safety ordinance of the industrial accident commission of the state of California. This ordinance, in section 7-3201-b, under the heading "Flammable Liquids, Gases, and Other Mixtures", classifies certain locations and includes the following:

"Class I-A locations are those enclosures in which flammable volatile liquids, highly flammable gases, mixtures, or other highly flammable substances, are manufactured, used, or handled in open containers, or are stored in such a way that a hazardous condition may continually or frequently exist in the atmosphere. * * *

"Class I-B locations are those enclosures in which flammable volatile liquids, highly flammable gases, mixtures, or other high flammable substances, are manufactured, used, handled, or stored in closed containers or closed systems in such manner as to normally prevent escape and accumulation of such flammable substances with resultant creation of hazardous atmosphere * * *

In section 7-3203-1, it is, among other things, provided with reference to locations of classes I-A and I-B that:

"When portable lamps are necessary in either location, they shall be of the enclosed vapor-tight type. Portable lamps shall be properly protected by substantial metal or other approved types of guards to prevent breakage. Sockets for portable lamps shall be of the keyless type with no exposed metal parts."

In section 7-3032-m it is provided that:

"When it is necessary to use portable lamps, or other portable current consuming devices in either Class I-A or Class I-B locations, approved flexible cord designed for hard usage such as Type S or Type PA shall be used. For Class I-A locations such a flexible cord shall contain one extra insulated conductor which shall be properly connected to form a grounding connection for metal lamp guards, motor frames, and all other exposed metal portions of such portable lamps and devices.

"For Class I-B locations such a flexible cord shall contain one extra insulated con-

ductor which shall be properly connected to form a ground connection for motor frames and all other exposed metal parts of other devices other than portable lamps."

The cord or wire found by Gallagher is in evidence and is neither of the type S nor the type PA referred to in the above section. These types of cord enclose two or three wires in an outer covering of rubber. In fact, according to the testimony, the type of cord found is not one permitted by the ordinance of the city for uses of a portable cord anywhere, but is a sort of wiring intended to be installed either in electric conduits or in open wiring for the installation and control of electric current.

(b) What has just been said has mainly to do with the detached cord or wire referred to, found after the explosion projecting from vat 14 out through the manhole. Mention has, however, been made of the sockets in the temporary wire outside the vat. Appellants stress the claim that the connection arrangement was defective. On that subject the ordinance mentioned provides:

"7-3203-n. Cord Connections.

"In Class I-A and Class I-B locations connections of portable cords direct to supply conductors shall first be made mechanically secure and shall then be soldered and heavily taped. In addition the cord shall be securely supported so that the probability of a break in the conductors at this point will be minimized.

"7-3203-o. Receptacles and Attachment Plugs.

"For Class I-A locations, receptacles and attachment plugs, if used, shall be so connected as a part of a unit device with an explosion-proof interlocking switch that the plug can not be removed while the switch is in the 'on' position, or approved devices which seal the arc made when the current is interrupted by means of an explosion-proof enclosure, shall be used. Such receptacles and plugs shall be of the polarized type providing a connection for the grounding wire of the portable cord."

One Gill, an expert in the electrical business, testified as to various possibilities of a flash in various connections which might be caused either by the pulling from the socket of the plug on such a cord as the one mentioned, if the cord were attached to a lamp on the other end, or by the cord's being in contact with something where abra-

sions might occur in such insulation as it did have, and said "there is a safe, portable extension cord which may be safely used in an enclosed area with inflammable gases."

(c) Respondent had, as part of its equipment for supplying air to the vats while work was going on within them, a number of blowers, each consisting of an electric motor with a fan on the end of it for removing air. Witness Gill says that he took the end-plate off one of these and looked inside and that it was what is known as a brush type motor; that when it is in operation there is a spark depending upon the load that it has on it. The load on a blower, according to the witness, is constant, so it is fully loaded and there is a spark there from the brush to the commutator when it is in operation. It cannot be operated without throwing a spark which will ignite inflammable gas if it comes in contact with it. The spark, however, only occurs in starting the motor. The motor is not what is called a "vapor-proof" motor nor an "explosion-proof" motor. The ordinance above referred to provides, with respect to motors and generators, as follows:

"7-3203-e. Motors and Generators.

"For Class I-A locations, motors or generators shall be of one of the following classes:

"(a) Totally enclosed explosion resisting types.

"(b) Totally enclosed, with external ventilation by means of ventilating pipes carried to a safe source of ventilating air.

"For Class I-B locations, motors or generators shall be of the types permitted for Class I-A, or a type having no contacts, commutators, or sparking parts, or of the total enclosure type."

The testimony is that there are two large air-conditioning units in the hallway between tanks 7 and 29 (which would place them between 50 and 60 feet from vat 14) and that these circulate the air in the entire corridor and create quite a draft. There is testimony that they were operating at the time of the explosion. The purpose of the blowers just referred to is to pick up the air in the corridor and blow it into the tank and for that purpose the practice, according to Herzog, was to place the blowers right in the manhole and turn the current on to start the fan going. Our attention has not been called to any evidence, however, that there was any blower in vat

14 on the day of the explosion, either in use or otherwise.

(d) Besides the cord or wire above referred to as having been found projecting out of the manhole from vat 14 there was, after the explosion, found lying on the floor of this vat, a piece of lamp cord of another description, that is, one which was rubber covered, detached except for the remnant of a lamp on one end of it. There is testimony that respondent had furnished this type of cord to Hubbert and Cerezo. Appellant claims that this cord, as well as the other, was defective for the reason, among others, that it failed to conform with the ordinance provision that in such a locality the flexible cord should "contain one extra insulated conductor which shall be properly connected to some grounding connection for metal guards."

(e) It is further claimed that the entire temporary lighting line above described was installed in violation of the ordinance of the city, although the provisions of the ordinance referred to in that connection are principally those already quoted. It is further said, however, that it was installed without a permit from the city of San Diego. This latter claim is based on the testimony of one Johnstone, a city electrical inspector, to the effect that he was aware of no permit for any temporary work issued subsequent to July 14, 1934. It is questionable, however, whether that contention is correct, inasmuch as the vat building was still unfinished and a permit for the wiring of the building generally had been issued, which appears to have included a permit to use temporary wiring in and about construction, if incidental to the construction.

The foregoing statement in a general way summarizes those parts of the evidence as introduced on which, together with the presumption that Hubbert and his companion used due care for their own safety, appellants must, of necessity, mainly rely, to sustain their view that the case is one in which the doctrine of *res ipsa loquitur* is applicable.

In many details this evidence is undisputed in the record. In others it is sharply controverted. Herzog says that Hubbert and Cerezo were to work in vat 14 that day and that none of his own men were to do anything in that vat at the time. Jaeger says that he directed Hubbert and Cerezo to work that day in vat 14. The witness Falkenberg, already referred to as having

been working on the morning of the accident in vat 13 and as having seen Hubbert in the aisle as he left, also testified definitely that Hubbert and Cerezo had been working that morning in vat 14 (which was the next vat to him on the east). One Egan, an employee of respondent, testified that during the morning of the day of the explosion he saw Hubbert using the "gas plate" or "hot plate" in the hall, heating his tar or asphalt. We have already noticed that the asphalt used in the mop coat was melted asphalt. He says that while such a plate was from time to time used by respondent's employees, they did not use it in the hall. Jaeger gave it as his impression that that vat had been filled with water on August 3. Witness Porter says that on his inspection of the premises just after the explosion on the same morning, the burner of the gas plate was not in operation. He says he noticed that the valves of the acetylene tank were closed. He did not look in the morning at the valves of the gas tank but did notice that afternoon that they were closed. In addition to the tar bucket just under the manhole of vat 14 he noticed a smaller bucket or pail and between the two was laid a brush. Just east of the manhole of this vat there was a tin can, oblong, with a gas mask lying on it, and a piece of hose coming from it over the tar bucket. The portion over the bucket was very badly charred and burned. The end of the hose ran into the manhole above and there was a piece of the other end of the hose that protruded out again from vat 14 through the pipe chase for about 6 inches into the hall. This hose the witness later referred to as a "garden hose." He says that the manhole of vat 12 was closed and locked. According to him, there was no hose connected with the acetylene and air tanks at all. Asked whether he saw any hose connected to the bottled gas tanks or other tanks located at or about the southeast corner of vat 18 (where, as he saw, the record apparently shows these tanks to have been located) and whether he saw hoses running along the hallway and into tank 14, he said:

"No, there were no hoses east of the approximate front of 17. There was a hose in addition to the one which was coiled up there, which ran back to a gas tank or a tank of gas which stood just about opposite the entrance. That went to the stove, to the little gas plate. Beyond that there was no hose of any kind in the hall excepting

the hose which was attached to the gas mask and a piece of which came out of the port hole and went up and again came out of the pipe chase in the hall, as I would describe it."

The fire marshal, Newton, agrees with Porter that an inspection following the explosion disclosed that there were no hoses attached to the acetylene tank. The gas plate or stove, according to him, was not even warm. One Klein, a time keeper for respondent, testified that Hubbert had, on previous occasions, used gasoline as a solvent. Frank Cramer, another employee of respondent, who says he had from time to time been assigned to help Hubbert and Cerezo, testified that some two weeks before the accident Hubbert had had him buy gasoline as a solvent for him and that Hubbert had paid for it; that the witness had in the past helped Hubbert and Cerezo mix gasoline with asphaltum in the yard. Respondent's superintendent, Jaeger, said he had seen Hubbert and Cerezo use both kerosene and Stoddard's Solvent as a "cut back" and that on one occasion he had seen them using gasoline and had forbidden it. Newton testified that the flash point of gasoline is just above zero, while that of either kerosene or Stoddard's Solvent is above 100 degrees Fahrenheit. Gasoline vapor, according to him, mixed with air, is explosive if the proper percentage of vapor is reached. Respondent's chemist testified that a spark from the blower would not cause an explosion of either Stoddard's Solvent or kerosene and that it would not even cause an explosion of gasoline if the blower were kept going so that the gas would not accumulate. There is testimony that Hubbert had at some time before the explosion declined the use of a blower to ventilate such vats as he worked in, saying that he had his own "system". Respondent's theory about the gas mask and garden hose referred to attached to it, is that they were a device which Hubbert employed to obtain sufficient air while working in vat 14.

The court addressed to the jury a special interrogatory as to whether Cerezo and Hubbert used gasoline as a solvent to "cut back" the material used and to be used in vat 14, to which the jury answered "no".

[1] It would prolong this opinion to inordinate length to further detail the evidence and we think the foregoing statement sufficient as a basis for disposing of the case. Since the motion for an instructed verdict

was necessarily made after all the evidence was in and the inferences which appellants seek to draw are not confined to those founded alone on the testimony introduced by themselves, it has not been practicable in stating the evidence to exclude from the statement all that is favorable to respondent. At times appellants rely on statements of witnesses, as notably in the case of witness Falkenberg, favorable to themselves, even though further statements of the same witness are unfavorable. The circumstance, however, that we have referred to evidence favorable to the respondents does not, of course, mean that we are unmindful that in reaching our decision we must resolve every real conflict in appellants' favor and allow appellants the benefit of every inference that may legitimately be drawn, whichever side may have introduced the evidence on which it is founded.

[2] The principles of law that must govern the action of a trial court in passing upon a motion for judgment non obstante veredicto are thoroughly settled. Such a judgment is in order "when a motion for a directed verdict, which should have been granted, has been denied, and a verdict rendered against the moving party". Code Civ. Proc. § 629. The state of the evidence that calls for such a judgment, therefore, is the same which would have called for a directed verdict. That is to say, as stated in *Barthelmess v. Cavalier*, 2 Cal.App.2d 477, 480, 38 P.2d 484, 486:

"The rendering of a judgment notwithstanding the verdict is made by section 629 of the Code of Civil Procedure to depend upon the existence of grounds for the granting of a motion for a directed verdict. See *Estate of Fleming*, 199 Cal. 750, 251 P. 637; *Estate of Yale*, 214 Cal. 115, 124, 4 P.2d 153. The power to direct a verdict is as stated in *Estate of Yale*, supra, 'touching that state of the evidence, the same as the right of the court to grant a nonsuit at the conclusion of the evidence.' And the right is to be exercised only when, after giving to the testimony of the plaintiff its full scope and indulging in all favorable and legitimate inferences from it, there is no substantial evidence to support a verdict for the plaintiff. *Estate of Caspar*, 172 Cal. 147, 150, 155 P. 631; *Estate of Flood*, 217 Cal. 763, 768, 21 P.2d 579. 'Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary sup-

port that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' *Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768."

As said in *Estate of Lances*, supra, page 400, 14 P.2d page 768, quoting from *Newson v. Hawley*, 205 Cal. 188, 190, 270 P. 364:

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.'"

Expressions to this effect have become so trite that it is needless to even refer to the numerous other authorities in which they appear.

[3-5] In the instant case, however, all possible theories about the cause of the explosion and fire that resulted in the death of Hubbert and his companion, must necessarily be built up from the circumstances. Appellants' counsel strongly emphasize the undoubted principle of law that everyone is presumed to have used reasonable care for his own safety. *People v. Milner*, 122 Cal. 171, 54 P. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 P. 497; *People v. Siemsen*, 153 Cal. 387, 95 P. 863; *Pabst v. Shearer*, 172 Cal. 239, 156 P. 466; *Thompson v. Davis*, 172 Cal. 491, 157 P. 595; *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 210 P. 269; *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Pacific Portland Cement Co. v. Reinicke*, 30 Cal.App. 501, 158 P. 1041; *Grant-ham v. Ordway*, 40 Cal.App. 758, 182 P. 73. It is settled also that this presumption is evidence and may, in certain cases, outweigh even positive evidence produced against it. *Smellie v. Southern Pacific Co.*, supra, page 549, 299 P. 529, citing the same cases last above referred to. Taking this presumption, however, at its uttermost value, it can, in any event, have no greater effect here than to exculpate Hubbert and his companion from any charge of having been themselves

guilty of negligence. It has not of itself any tendency or force to impute negligence to respondent. The burden was still with appellants to establish not only such negligence on respondent's part, but also that respondent's negligence was the proximate cause of the explosion and the resulting fire in which the fatal injuries to Hubbert and his companion were received.

[6] To be sure, these elements of appellants' case may be established by circumstantial evidence, but the question here is whether the circumstantial evidence adduced is legally sufficient for that purpose.

As laying the ground for applying the doctrine of *res ipsa loquitur*, counsel for appellants (if we may somewhat abbreviate their statement) urge: that the explosion and fire occurred at vat 14 and that vat 14 was under respondent's exclusive control and that concrete vats do not in the ordinary course of things explode or burn; that Hubbert and Cerezo were not at the time of the explosion in or at vat 14 but had been applying in vat 12 water-proofing material supplied by respondent, with mops and brushes and not using any flammable materials; that respondent kept stored and used on its premises highly flammable substances and on the morning in question respondent's employees were using torches fueled with bottled gas lighted by matches and wicks and that the acetylene-oxygen and bottled gas tanks were connected with vat 14; that various elements of wiring and electrical connections were maintained by respondent in and about vat 14 which might readily produce arcs or sparks when in use or even when not in use and especially in the work being carried on that morning by the respondent's workmen; and that though Hubbert and his companion, both now deceased, were the only two employees of the independent contractor working in the cellar that day, and there were some ten of respondent's employees working there, these were for the most part not produced; from which, according to appellants, it must be assumed that if produced their evidence would have been unfavorable. In the light of this situation it is claimed that the application of the doctrine *res ipsa loquitur* makes out a case for appellants, in the face of which the trial court could not reasonably have said that the verdict was unsupported by substantial evidence.

The positions thus taken are, so far as the facts are concerned, only in part supported by evidence. It cannot, indeed, be doubted that the explosion and fire did

occur within vat 14 and in the aisle adjacent thereto on the south and it is true enough that concrete vats do not of themselves explode. If it be true that Hubbert and Cerezo were not on the day of the explosion working in vat 14, then it may be believed that on that day that vat was under the exclusive control of the respondent. Despite Falkenberg's positive statement that Hubbert and Cerezo were in fact working in vat 14 that morning it might be possible, if such statement were not believed, to infer from Moir's statement that he saw Hubbert looking into vat 12 and that there was a light therein, coupled with the position of Cerezo's shoes after the accident, that Hubbert and Cerezo had not worked in vat 14 that day, though the inference would by no means be a necessary one. Appellants, nevertheless, have not in their briefs pointed out anything in the record which actually shows that either acetylene or bottled gas had in fact been used at all in or about vat 14 on the day of the explosion. As to the acetylene, we have seen that the evidence conflicts with respect to whether or not its tank was, at the time, connected by hose with vat 14 or not, but if it be assumed that it was, still such testimony as there is on the subject is to the effect that the valve on the tank was closed. Nobody claims to have found it open. While the bottled gas was always available on the outside of the vats in the sense that there were pipes there leading from the tank where it was kept, the testimony of Jaeger is that the valve in the tank was found after the explosion to be closed and we have had no evidence to the contrary pointed out, and, moreover, we are aware of no evidence that there was, on the day of the explosion, any device attached and thereby made available at vat 14 for conducting it into that vat. Whatever was the function of the garden hose that witness Porter says he saw projecting into the vat through the manhole and coming out again through a pipe chase with the gas mask attached to it, there is nothing to show that the hose was connected with any gas pipes. Neither is there any testimony at all that respondent made any use of gasoline either on the day of the explosion or at any other time, nor any evidence of any sort to that effect, unless it be inferred from the presence in the aisle after the accident of the two asphalt pails which smelled of gasoline and from which it was manifest that somebody had used gasoline. As respects kerosene and Stoddard's Solvent, there is, in

the first place, no evidence that they were being used that day in vat 14 or anywhere else, unless it is inferable that the decedents were using them, and, secondly, while they might be set afire by a spark if there was one, neither would be likely to explode. Our attention is called to no evidence that in terms shows that any of the ten men whom respondent is said to have had at work in the cellar that day were engaged in applying "brewer's pitch" otherwise than in vats 17 and 18 or which can reasonably be the basis for inferring that they were using any torches elsewhere, if, indeed, they were using any there. Assuming it to be true that respondent's electrical wiring and connections did not measure up to the requirements of the city ordinance and that the unattached double wire that was found was used by somebody that day for lighting up vat 14 and that the lighting arrangements might have caused some spark, it is yet manifest that such spark could have brought about an explosion only if it came in contact with something explosive and, as just observed, our attention has not been called to any evidence other than such as may be supposed to result from inference, that respondent was making use of anything explosive in or about vat 14 on the day of the accident, or that any of its own men were working there that day at all. Whatever evidence, then, to that effect, may have been conceived to exist, must amount merely to an inference drawn either from the fact that bottled gas and acetylene, as well as kerosene and Stoddard's Solvent, were available for use generally in the work of water-proofing the vats, or from the fact that after the explosion the buckets smelling of gasoline were found. Respondent did have something like ten employees working in the cellar that morning, only three of whom, Moir, Falkenberg and one Walters, took the stand. Not any one of these three appeared to have been using any gas or acetylene torch, or gasoline, or anything else of an explosive nature that day. All of the ten employees except Moir had left for lunch before the explosion, and it is hardly possible to infer, from the mere fact that seven of them were not called to testify, either that they were handling explosives in proximity to vat 14 that day or that they had worked in a position that would have made their testimony important or have enabled them to shed any light on the accident.

[7] What basis, then, does all this afford for applying the *res ipsa loquitur* doc-

trine? The generally accepted statement of the *res ipsa loquitur* doctrine laid down in *Scott v. London etc. Docks Co.*, 3 H. & C. 596, 601; 159 Reprint, 665, repeated in *Shearman & Redfield on Negligence*, 6th ed., p. 132, and referred to in 45 C.J. 1193, as the one "most frequently adopted and applied in subsequent decisions", is that:

"Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care."

This has, in many California cases, been stated to be the law, *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 P. 1020, 29 L. R.A. 718, 48 Am.St.Rep. 146; *Harrison v. Sutter Street Ry. Co.*, 134 Cal. 549, 550, 66 P. 787, 55 L.R.A. 608; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 344, 73 P. 164; *O'Connor v. Mennie*, 169 Cal. 217, 223, 146 P. 674; *White v. Spreckels*, 10 Cal.App. 287, 292, 101 P. 920. In *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480, it was said to be (page 239) "*elementary that the maxim, 'res ipsa loquitur,' translated means simply, 'the thing or affair, speaks for itself'". Appellant says that here the "thing" which caused the injury was the "explosion and resulting fire". To say, however, that the "explosion and resulting fire" were under the exclusive control of the respondent would be to talk nonsense, and manifestly, as indeed appellant concedes, that which must be shown to have been under the respondent's exclusive management is the instrumentality, whatever it was, that caused the explosion. There are, indeed, cases in which a showing that every instrumentality to which a given injury could with reasonable probability be attributed was under a defendant's management has been accepted by the courts as, for practical purposes, the equivalent of a showing that the defendant controlled the particular instrumentality that did cause it. Such a case is *Judson v. Giant Powder Company*, *supra*, where the plaintiff's property was injured by an unexplained explosion in an adjacent dynamite factory under the exclusive management of the defendant. Cases of the same general description are *Faras v. Lower Calif. Dev. Co.*, 27 Cal. App. 688, 151 P. 35; *Lippert v. Pacific Sugar Corp.*, 33 Cal.App. 198, 208, 164 P.*

810; Hallawell v. Union Oil Co., 36 Cal. App. 672, 173 P. 177; Phoenix Assur. Co. v. Texas Holding Co., 81 Cal.App. 61, 252 P. 1082, and Smith v. Southern Counties Gas Co., 89 Cal.App. 81, 264 P. 532. Such, also, are many of the cases in which the doctrine *res ipsa loquitur* has been applied to fix the responsibility for injuries sustained on railroad trains or other conveyances.

[8, 9] The instant case is of a very different character. The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant. *Depons v. Ariss*, 182 Cal. 485, 488, 188 P. 797. To justify the invocation of the rule *res ipsa loquitur* the instrumentality which caused the injury must have been under the exclusive management of the defendant. As was said in *Biddlecomb v. Haydon*, 4 Cal.App.2d 361, 364, 40 P.2d 873, 874, in which a hearing was denied by the Supreme Court:

"The rule of *res ipsa loquitur* does not apply unless the instrumentality causing the injury is shown to have been under the exclusive control or management of the one sought to be charged with responsibility therefor. Neither does it apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible. *Brown v. Board of Trustees*, 41 Cal.App. 100, 182 P. 316; *Olson v. Whitthorne & Swan*, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129. In *Scellars v. Universal Service*, 68 Cal.App. 252, 228 P. 879, the court quotes with approval from the case of *Lucid v. E. I. DuPont, etc., Powder Co.*, 199 F. 377, L.R.A.1917E, 182; 118 C.C.A. 61, where the court said: 'The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.' See, also, *Gritsch v. Pickwick Stages System*, 131 Cal.App. 774, 22 P.2d 554."

In the instant case we are forced by a process of elimination to conclude that there is no sufficient evidence to sustain any inference as to what instrumentality caused the explosion, or that it was caused by any of the instrumentalities that have been pointed out, unless it be the inference that whoever had been using the tar buckets smelling of gasoline, one of which was

found just below the manhole of vat 14, had that morning been using gasoline within that vat, and that some spark or flame without the vat ignited the gasoline in that bucket, which not only exploded but was so near the manhole as to result in a co-incident explosion of the accumulated gasoline fumes within the vat. Assuming that the jury did draw that inference, as it may have done, we would, to sustain the verdict, next be required, in the light of its answer to the special interrogatory, to understand that it further inferred, and to hold that it could be justified in inferring, that neither Hubbert nor Cerezo was responsible for the presence of the gasoline, and then that the jury carried, and could be justified in carrying, that inference a step farther, by inferring that because Hubbert and Cerezo were not responsible for the presence of the gasoline respondent must have been; and further, that the jury inferred and could be justified in inferring that the flame which ignited the gasoline either originated in some piping or connection under the respondent's exclusive control or else was something the presence of which, in the exercise of ordinary care, the respondent ought, to have anticipated; all this as a preliminary to applying the final inference necessary to the application of the *res ipsa loquitur* doctrine, namely, that whatever negligence it was that brought the spark or flame into actual contact with the gasoline was respondent's negligence.

Respondent, planting itself upon the authority of *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 366, 367, 64 P. 480, asserts that the argument that legal liability can be predicated because of an inference piled upon another inference or a presumption piled upon additional presumptions, has long been repudiated in this state. As substantiating the same proposition we are referred to *Hernandez v. Southern California Gas Co.*, 213 Cal. 384, 387, 388, 2 P.2d 360, and to various explosion cases from other jurisdictions, including *Schaller v. Independent Brewing Ass'n*, 225 Ill. 492, 80 N.E. 334; *Sowers v. McManus*, 214 Pa. 244, 63 A. 601; *Ammon v. Horan & Hardart Baking Co.*, 321 Pa. 49, 183 A. 786, and *Courtney v. New York, N. H. & H. R. Co.*, D. C., 213 F. 388; and *Puget Sound T., etc., Co. v. Hunt*, 9 Cir., 223 F. 952, 139 C.C.A. 432, wherein it is said that (page 955):

"Negligence is sometimes presumed, as in cases where the doctrine of *res ipsa lo-*

quitur applies, or where there has been a violation of a statutory duty, but the proximate cause of an injury is never presumed."

[10,11] Appellant argues that each of the group of cases last cited is for one reason or another distinguishable in its facts from the instant case. Doubtless some of the differences pointed out do exist. We do not think, however, that the instant case is one that justifies extensive research into borderline distinctions. There must be some point in the stretching of a thread at which it will break. In this case, in order to have reached its verdict, the jury must necessarily have based one inference on another until the filament of its reasoning was so extended and so tenuous as to have brought about nothing better than a mere guess as to the presence of circumstances on the basis of which it must, then, have undertaken to apply the doctrine *res ipsa loquitur*. A verdict of that description is not supported by substantial evidence. In these circumstances the respondent was entitled to an instructed verdict, and, therefore, the trial court's action in granting a judgment *non obstante veredicto* was right.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 754

Margaret May CERESO, Plaintiff and Appellant, v. AZTEC BREWING COMPANY (a Corporation), Defendant and Respondent.

Civ. 2028.

District Court of Appeal, Fourth District, California.

June 2, 1938.

Rehearing Denied June 28, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

W. I. Gilbert, Jr., of Los Angeles, for appellant.

Mathes & Sheppard, of Los Angeles, and Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

HAINES, Justice pro tem.

This appeal involves the same state of facts involved in the companion case of

Hubbert v. Aztec Brewing Company, 80 P.2d 185, this day decided.

We concur: BARNARD, P. J.; MARKS, J.



26 Cal.App.2d 703

THOMPSON v. BALDWIN.

Civ. 10675.

District Court of Appeal, First District, Division 2, California.

June 3, 1938.

Rehearing Denied July 2, 1938.

Hearing Denied by Supreme Court
August 1, 1938.

1. Automobiles ⇨217(2)

A pedestrian, looking to right at about middle of street and seeing stopped automobile, which was still stopped when she reached point directly in front of it on pedestrians' marked crosswalk, had right under statute to proceed to curb unmolested, regardless of whether city ordinance, prohibiting vehicle operator from driving into crosswalk until pedestrian therein on half of roadway wherein vehicle is traveling has passed beyond its path, is invalid as in conflict with such statute. St.1935, p. 188, § 560(a).

2. Trial ⇨296(4)

All error in instruction that every person using public highway has right to assume that all other persons know and will obey law was cured by other instructions clearly limiting "every person" to one free from negligence.

3. Trial ⇨194(16)

An instruction that it is automobile operator's duty to keep machine under control and anticipate presence of others on highway was not erroneous as taking from jury question of defendant's negligence in action for injuries to pedestrian struck by automobile, which started forward when plaintiff was directly in its path on pedestrians' marked crosswalk after being stopped at street intersection.

4. Automobiles ⇨245(6, 44)

The negligence of driver of automobile, starting forward when pedestrian was directly in its path on marked crosswalk after being stopped at street intersection,

whether because of driver's failure to have automobile under control or to observe pedestrian's presence, was fact question for jury in action for resulting injuries to pedestrian.

5. Automobiles ⇨246(4)

An instruction that defendant in action for injuries to pedestrian struck by automobile, which proceeded forward when plaintiff was directly in its path on marked crosswalk after being stopped at street intersection, was complying with provisions of Motor Vehicle Code, if he was driving automobile as close as practicable to righthand curb at time of accident, was properly refused as too broad.

6. Damages ⇨132(6)

A verdict, awarding woman \$6,000 damages for broken leg bones and ankle joint, requiring hospital treatment, confining her to bed for 48 days, necessitating use of crutches thereafter and resulting in continued pain and permanent restriction of motion of ankle joint 5 months after accident, was not so grossly excessive as to show prejudice in itself, and hence will not be disturbed on appeal as excessive, where record shows no error in course of trial nor any evidence of passion or prejudice.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Constance Thompson against Murray Baldwin to recover damages for personal injuries sustained when struck by an automobile driven by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Jesse H. Miller, of San Francisco, for respondent.

NOURSE, Presiding Justice.

On a trial with a jury plaintiff had a verdict for \$6,000 in an action for damages for personal injuries. A motion for a new trial was made and denied, and the defendant has appealed from the judgment criticizing certain instructions and attacking the award as excessive.

There is no material conflict in the evidence, and though the defendant pleaded contributory negligence on the part of the

plaintiff, no evidence was offered to support that issue. The plaintiff was walking northerly across California street at its intersection with Polk street, proceeding within the pedestrian lane clearly marked for that purpose. The defendant was driving an automobile westerly on California street and stopped a few feet easterly of this crosswalk in obedience to an arterial stop sign placed at that corner of the intersection. While the automobile was standing in this position, the plaintiff, when approximately at the middle point of the intersection, looked to her right and, observing that the machine had stopped, passed on in front of it. While so doing the defendant started his car forward, causing the right front fender thereof to strike the plaintiff. The impact knocked the plaintiff to the pavement, and the right front wheel ran over one of her legs. Both of the bones of the leg were broken, and the fractures extended into the ankle joint. Plaintiff was given hospital treatment and confined to her bed from December 18, 1936, to February 4, 1937. Thereafter, she was able to get around to some extent with the use of crutches, but at the time of the trial, five months after the accident, she was still suffering pain and restriction of the motion at the ankle joint which appeared to be a permanent disability.

[1] The appellant criticizes the giving of an instruction in the terms of the traffic ordinance of the city and county of San Francisco which provided that it should be unlawful "for the operator of any vehicle to drive into any crosswalk * * * while there is in such crosswalk upon the half of the roadway upon which such vehicle is traveling any pedestrian engaged in crossing the roadway until such pedestrian shall have passed beyond the path of said vehicle". It is contended that this portion of the ordinance is invalid as in conflict with the provisions of the state Vehicle Code, St.1935, p. 93, relating to the same subject-matter. Section 560 of this code, St.1935, p. 188, is the one referred to. It provides: "(a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk * * *." Because of the peculiar circumstances of this case, we expressly refrain from passing on the question of the asserted invalidity of the ordinance provisions. Here the conceded facts are that when the plaintiff was at about the middle of the crossing she looked to her right and saw that the vehicle was stopped. When she

had reached a point directly in front of the vehicle it was still stopped. Within all rules of reason she then had the right of way to proceed to the curb unmolested within the plain terms of the Vehicle Code. Under such circumstances the provisions of the ordinance referred to state nothing more than a commonplace injunction that the operator of a vehicle should not deliberately start forward and strike down one in the crosswalk who thus has the right of way to proceed.

[2] The appellant complains of the instruction stating that "every person using a public highway has a right to assume that all other persons * * * know the law and that they will obey the law". Standing alone this instruction meets the condemnation of *Roller v. Daleys, Incorporated*, 219 Cal. 542, 545, 28 P.2d 345, *White v. Davis*, 103 Cal.App. 531, 545, 284 P. 1086, and similar authorities holding that this rule does not apply to one who is himself negligent. However, all the error which appears in this portion of the instruction is cured by other instructions given which clearly limit "every person" to one who is himself free from negligence.

[3,4] Criticism is made of the instruction that it is the duty of the operator of an automobile to keep the machine under control and to anticipate the presence of others on the highway. It is argued that the instruction omits the test of ordinary care, requires the operator of the vehicle to avoid all accidents, and takes from the jury the question of negligence. The argument is purely academic. The first two objections noted are fully covered by other instructions given. We cannot follow appellant's argument as to the third. The admitted facts are that the car was started forward when the respondent was directly in its path. If this was caused by appellant's failure to have the car under control or his failure to observe the presence of respondent in the crosswalk, the question of appellant's negligence was still a question of fact to be determined by the jury. It is a matter of no consequence what caused the car to proceed at that particular moment.

Whether from lack of control or from carelessness, the result is the same—that it was either appellant's act of omission or his act of commission which caused the injuries.

[5] Appellant complains of the refusal of the trial court to give his proffered instruction that it was his duty under the Vehicle Code to drive his automobile as close as practicable to the right-hand curb, and that if the jury found that he was doing so at that time "he was complying with the provisions of the Motor Vehicle Code". The proposed instruction was entirely too broad. He may have been complying with one provision of the code, but at the same time may have violated all the others. His compliance or noncompliance with this particular provision was no issue here because whether near or far from the curb, he was not justified in proceeding forward at a time when the plaintiff was directly in his path.

[6] Finally it is argued that the damages are excessive and the amount of the verdict is the full extent of the argument. Nothing appears in the record which gives any semblance of passion or prejudice on the part of the jury. The case was thoroughly and fairly tried before an able trial judge who heard all the testimony relating to the respondent's injuries and noted her physical condition at the time of the trial. The verdict was attacked as excessive on a motion for new trial, and the same trial judge denied the motion. Under the state of the record we are therefore asked to substitute our judgment for that of the trial judge in a matter in which he is better qualified to act. Though our affirmance of the judgment should not be treated as an approval of the award made, we are not inclined to interfere with the verdict on the ground that it is excessive when the record shows no error in the course of the trial, no evidence of passion or prejudice, and the amount of the verdict is not so grossly excessive as to show prejudice in itself.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

11 Cal.2d 395

80 P.2d

CITY OF LOS ANGELES et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST. et al.

S.F. 15990.

Supreme Court of California.

June 9, 1938.

Rehearing Denied July 8, 1938.

I. Constitutional law ☞70(1)

The Legislature's finding, either by designation of territory comprising flood control district or by express declaration in statute authorizing levy of taxes on real property in district to pay bonds of drainage districts therein, that lands included or affected are benefited by drainage improvements transferred to district presupposes appropriate and adequate inquiry and is conclusive on property owners and courts, so that benefits need not be realized in fact, if there is reasonable foundation for finding of potential benefit. St.1937, p. 1763, § 13½; St.1915, p. 1509, § 16.

2. Constitutional law ☞48

It must be presumed that Legislature, designating particular drainage improvements which flood control district might acquire in statute authorizing acquisition thereof, concluded that entire district would be benefited by use of such improvements in conjunction with flood control facilities, though initially employed for direct beneficial use of restricted area. St.1937, p. 1763, § 13½.

3. Levees and flood control ☞13½, 22

The section of Los Angeles County Flood Control District Act, authorizing district supervisors to acquire certain classes of drainage improvements within district, is not inconsistent with section requiring them to employ engineers to formulate best plan for carrying out purposes of act. St.1937, p. 1761; p. 1763, § 13½; St.1915, p. 1504, § 4.

4. Constitutional law ☞290(4)**Levees and flood control ☞2**

The statute, authorizing flood control district supervisors to acquire certain classes of drainage improvements within district and levy taxes on realty therein to pay drainage district bonds, is not unconstitutional as resulting in deprivation of property without due process of law because of failure to declare expressly that such improvements are beneficial or useful to lands in flood control district and provide means for hearing and finding on such question by designated body. St.1937, p. 1763, § 13½.

5. Levees and flood control ☞3

Adjustments of such matters within legislative discretion as designation of district to bear expense of local improvement and mode in which it shall be borne and distributed may be made after organization of such corporate bodies and districts as flood control district acquiring drainage district improvements. St.1915, p. 1502; St. 1937, p. 1763, § 13½.

6. Constitutional law ☞48

Cogent reasons must appear in support of objections to particular statutory provisions relating to conduct of flood control districts, enacted after adoption of constitutional amendment authorizing Legislature to provide for supervision, regulation and conduct of irrigation, reclamation or drainage districts' affairs, before court is justified in declaring such provisions invalid. St.1915, p. 1502; St.1937, p. 1763, § 13½; Const. art. 11, § 13.

7. Levees and flood control ☞13½, 22

It is within legislative power to provide for combination of functions of drainage and flood control so that drainage waters may be conserved through joint facilities of drainage and flood control districts by statute authorizing flood control district to acquire drainage district improvements and levy taxes on realty in former district to pay drainage district bonds. St.1937, p. 1763, § 13½.

In Bank.

Proceeding by the City of Los Angeles and others against the Los Angeles County Flood Control District and others for a writ of mandamus to restrain assessments of lands outside certain drainage districts within defendant flood control district. On demurrer to the petition.

Peremptory writ denied and alternative writ discharged.

Ray L. Chesebro, City Atty., William H. Neal, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, and Ray L. Chesebro, in pro. per., for petitioners.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, H. W. Kennedy, Deputy Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, all of Los Angeles, for respondents.

U. T. Clotfelter and F. Ray Bennett, both of Los Angeles, amici curie for owners of taxable property in respondent district.

SHENK, Justice.

This proceeding in mandamus presents the question of the constitutionality of section 13½ of the Los Angeles County Flood Control District Act added to the statute in 1937 (Stats.1937, p. 1763). The original statute is found in the Statutes of 1915 at page 1502.

The petitioners allege their ownership of lands situated and assessable within the Los Angeles County Flood Control District but outside the confines of certain named drainage districts within the flood control district. The petition shows that in December, 1937, the board of supervisors of Los Angeles county, acting as the board of supervisors of the flood control district, by resolution, accepted a transfer to the flood control district of the storm drain improvements, drainage improvements and drainage systems of drainage districts numbers 1 and 3, organized under the statute of 1903 (Stats.1903, p. 354), and of drainage districts numbers 8, 9, 11, 17, 22, 23, 25, 26 and 29, organized under the Drainage District Improvement Act of 1919 (Stats.1919, p. 731), and amendatory acts. All of said drainage districts and drainage district improvements are located within the territory comprising the Los Angeles County Flood Control District. In the course of the proceedings accepting the transfer the board did not expressly make a finding of the necessity or usefulness of such property for any of the purposes of the flood control district, nor was any hearing ordered or had on the question of such usefulness or necessity. The terms of the conveyance and acceptance provided for the transfer to the flood control district of funds on hand in the several drainage districts and for the assumption by the flood control district of the obligation to pay the principal and interest remaining unpaid on all outstanding bonds, issued by such districts to cover the cost of the improvements conveyed, maturing subsequent to the date of the conveyance or transfer. The petition discloses an intent on the part of the board of supervisors to proceed pursuant to the power vested in it by said section 13½.

It is alleged that the bond redemption and interest requirements of drainage districts numbers 8, 9, 11, 17, 22, 23, 25, 26, and 29 aggregate \$4,234,001.25; but what proportion, if not all, of this amount represents obligations maturing subsequent to the date of transfer is not indicated. It is stated that the board of supervisors intends to

levy annual special assessments upon all the real property within the flood control district sufficient to meet the outstanding obligations incurred for the drainage improvements accepted by the board. It is alleged and claimed by the petitioners that such special levy on lands within the flood control district but outside of the drainage districts whose obligations would be affected thereby is illegal and void because, so it is urged, it would be a special assessment levied against property without regard to the accrual of benefits to the lands assessed, and therefore would be a denial of due process and the equal protection of the laws enjoined by the state and federal Constitutions. The petitioners seeks to employ the remedy here invoked to restrain the assessment contemplated by the board on lands outside the drainage districts. The alternative writ issued.

Questions of law only are involved. They are presented by a demurrer interposed on behalf of the respondents.

By section 13 of article 11 of the state Constitution the legislature is given power "to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state". Amendment adopted Nov. 3, 1914.

The objects and purposes of the Los Angeles Flood Control District Act were stated in section 2, St.1915, p. 1502, to be: "to provide for the control of the flood and storm waters of said district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters the harbors, waterways, public highways and property in said district". By section 16, St.1915, p. 1509, the board of supervisors was given the power to do all work and to construct and acquire all improvements necessary or useful for carrying out any of the purposes of the act; also to acquire either within or without the boundaries of the district, by purchase, condemnation, donation or by other lawful means, from private persons, corporations, reclamation districts, swamp land districts, levee districts, protection districts, drainage districts, irrigation districts, or other public corporations, or agencies, or districts, all lands, rights of way, easements, property or materials nec-

essary or useful for carrying out any of the purposes of the act, and to compensate any private owner or reclamation or other district or agency for property taken over or acquired by the flood control district as a part of its work of control or conservation or protection.

Section 13½ added by Statutes of 1937 provides that the board of supervisors of the Los Angeles County Flood Control District, by a four-fifths vote may accept a transfer and conveyance of all, but not less than all, storm drain improvements, drainage improvements or drainage systems lying within the territorial limits of the flood control district and within certain described classes, including those constructed prior to January 1, 1937, pursuant to provisions of the 1903 and 1919 acts hereinabove mentioned. Said section 13½ also contained the following provisions: "Upon the transfer or conveyance to said flood control district of any such storm drain improvements, drainage improvements or drainage systems, to pay the cost and expense of the construction of which bonds of any drainage improvement district have been issued, said flood control district shall thereupon be and become liable for the payment of the principal upon the bonds of such drainage improvement districts maturing subsequent to the date of such conveyance and upon the indebtedness of such drainage improvement district represented by interest coupons maturing subsequent to such date of transfer. The board of supervisors of the flood control district shall levy a special tax each year upon the taxable real property in said flood control district sufficient to pay the principal and interest on the bonds of said drainage districts as such principal and interest become due subsequent to the date of such conveyance and transfer. Such tax shall be levied and collected on said real property at the time and in the same manner as the general tax levy for county purposes, and when collected shall be paid into the county treasury of said county of Los Angeles to the credit of said district fund and shall be used for the payment of the principal and interest on said drainage district bonds and for no other purpose."

It will be noted that neither section 16 nor section 13½ provides for a hearing prior to acquisition of any of the property described therein, and that section 16 alone expressly restricts the acquisition of property to that which is necessary or

useful for the purposes of the district. It will also be noted, however, that section 16 does not refer to specific property, such as is described in section 13½. In other words, section 16 provides generally for the acquisition of such property as, in the opinion of the board of supervisors, may be necessary or useful to carry out the purposes of the flood control act. Section 13½, on the other hand, refers to the acceptance of a limited class of described property, namely, the specified storm drain improvements, drainage improvements, and drainage systems, which from the nature of such property indicates without any express declaration its relative usefulness for the purposes of the flood control district.

[1] The petitioners contend that inasmuch as the legislature in enacting section 13½ did not expressly find that drainage improvements constructed within the Los Angeles County Flood Control District are beneficial or useful to the lands in the district, and did not provide the means for a hearing and a finding in that respect by a designated body, an assessment levied on lands within the flood control district and outside the drainage districts to meet any part of the cost of such improvements constitutes a deprivation of due process of law. The contention, however, is necessarily grounded on the hypothesis that the drainage improvements are not per se useful for the purposes of the flood control district and therefore not beneficial to all the lands within that district, and that the absence of any legislative declaration of such benefit, or any provision for a hearing on the question of benefit to the lands affected, is fatal to the validity of the section.

To support their theory the petitioners argue that when the drainage districts were formed, especially the districts organized subsequent to the creation of the flood control district, they presumably included all of the territory which would be benefited by the respective drainage improvements, and that the omission from the districts of any surrounding area conclusively indicates that such area would not be benefited thereby. The petitioners rely generally on cases which hold that only the lands benefited may be assessed to pay the cost of such special improvements (*Spring St. Co. v. City of Los Angeles*, 170 Cal. 24, 148 P. 217, L.R.A.1918E, 197; *Atchison, T. & S. F. Railway Co. v. Reclamation*

Dist. No. 404, 173 Cal. 91, 159 P. 430) and on cases holding that to permit assessments for special improvements without a legislative declaration of benefit to the lands assessed or a provision for a hearing and finding by a properly constituted body, is to deprive the owner of due process in violation of the state and federal Constitutions. *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 S.Ct. 56, 41 L.Ed. 369; *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 208 P. 304.

Nevertheless the petitioners correctly concede that if the legislature itself has found, either by designating the territory to comprise the district or by expressly so declaring, that the lands included or affected are benefited, such a finding presupposes appropriate and adequate inquiry and is conclusive upon the property owners in the district and upon the courts (*Fallbrook Irrigation Dist. v. Bradley*, *supra*; *People v. Sacramento Drainage Dist.*, 155 Cal. 373, 386, 103 P. 207; *Brookes v. City of Oakland*, 160 Cal. 423, 117 P. 433; *Miller & Lux v. Board of Supervisors*, *supra*); and in such case it is not essential that the benefits be realized in fact, if otherwise there is any reasonable foundation for the finding of potential benefit. *Board of Directors of Crawford County Levee Dist. v. Dunbar*, 107 Ark. 285, 155 S.W. 96.

[2,3] The petitioners point to the inclusion in section 16 of language specifying that lands or improvements within or without the district to be acquired pursuant to the authority of that section must be such as will be necessary or useful for carrying out the purposes of the act, and to the absence of any such qualifying language in section 13½, as indicative of the invalidity of the latter section. The petitioners, however, have not fully appreciated the necessity for the inclusion of such qualifying language in section 16 and the reason for its omission from section 13½. As noted, section 16 confers the general power upon the board of supervisors to acquire such lands or works, wherever they may be situate, as may be necessary or useful for the purposes of the act. In contrast to that, by section 13½ the legislature itself has specified particular property which may be acquired by the flood control district. Flood control necessarily covers a much larger field and a broader program than one restricted merely to drainage of a specified area. It conceiva-

bly includes works or improvements which may be far removed from the lands which will be protected and benefited thereby. It is therefore within the legislative discretion to conclude that a system of drainage improvements, although initially employed to the direct beneficial use of a restricted area for drainage purposes, may be employed in conjunction with flood control facilities for the benefit of a much larger area. By designating in section 13½ the particular property which may be acquired by the flood control district it must be presumed that the legislature concluded that the entire flood control district would be so benefited by the use of the designated drainage improvements in the larger and broader program of the flood control act. The petitioners do not question the propriety of a legislative finding that the designated improvements would be so beneficial. They complain of the absence of an express declaration in that regard. But from the import of section 13½ the legislature must be deemed to have exercised its plenary power to make such a finding. That section is not construed as granting a general power to the board of supervisors to acquire properties for the use of the district. It is rather a special declaration that it may acquire on behalf of the flood control district certain designated properties, namely, drainage works and improvements and systems constructed prior to January 1, 1937, by certain classes of drainage districts within the flood control district. This particularity of description of the improvements and property authorized to be accepted by the district presupposes a prior inquiry and investigation on the part of the legislature and a finding by it that such designated improvements will be useful for the purposes of the district and beneficial to the territory comprising the flood control district. It is obvious therefore that sections 16 and 13½ have no necessary relation to each other. Nor is section 13½ inconsistent with section 4 of the act, St.1915, p. 1504, which requires the board of supervisors to employ engineers to formulate the best plan for carrying out the purposes of the act. In the matter of the acquisition of the property described in section 13½ the legislature has itself decided the usefulness of the property to the purposes of the flood control district. Section 13½, together with the enactment of a general statute on the same subject (Stats.1937, p. 1761), evidences the adoption by the

legislature of a comprehensive program of drainage and flood control in the various counties to be carried out by flood control districts, rather than divided among counties, drainage districts and flood control districts.

[4] The Constitution and the decisions do not preclude the carrying out of that program by the enactment of the legislation referred to. As pointed out in *Hadley v. Dague*, 130 Cal. 207, 220, 62 P. 500, 505, the mode in which the expense is to be borne as well as the district which is to bear the expense and the manner of distributing the expense are legislative questions. It was there held that although the theory upon which the expense is charged to the land in the district is that the property has received a particular benefit, nevertheless the validity of the assessment does not depend upon the ability to show that the property received a benefit commensurate with the amount of the assessment, that is, that the benefit is identical with the burden. And quoting from *Fallbrook Irrigation District v. Bradley*, supra, the court recognized that although the method of arriving at the amount of the burden may in some instances result in inequalities, that circumstance was "far from rising to the level of a constitutional problem, and far from the case of taking property without due process of law". The *Hadley* Case referred to the case of *Lent v. Tillson*, 72 Cal. 404, 428, 14 P. 71, and the statement therein that the benefits need not be immediate, but that the only just limitation, if any existed, with respect to assessing for such benefits, was that "a tax will not be upheld when the courts can plainly see that the legislature has not really exercised its judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature."

[5] The following language from the case of *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 124, 125, 169 P. 1028, 1030, might well be held applicable in disposing of the petitioners' contention herein: "The mere passage of the act, then, must be taken to import a finding by the Legislature that the proposed work will answer a public purpose, and that its execution will benefit the land within the district to such an extent as to warrant the imposition upon such land

of the cost in the manner provided. The findings thus implied are as fully effective as if declared in express terms in the act itself. *San Christina Inv. Co. v. San Francisco*, 167 Cal. 762, 769, 141 P. 384, 52 L.R.A., N.S., 676. The fixing of the district which is to bear the expense of a local improvement, and the mode in which such expense is to be borne and distributed, are, primarily, legislative questions." It has long been settled that adjustments in such matters which are within the legislative discretion may be made subsequent to the organization of such corporate bodies and districts. *Johnson v. City of San Diego*, 109 Cal. 468, 42 P. 249, 30 L.R.A. 178; *Palo Verde Irr. Dist. v. Seeley*, 198 Cal. 477, 245 P. 1092.

[6] The legislature has been invested with an enlarged discretion by section 13 of article 11 of the Constitution. Cogent reasons must therefore appear in support of objections urged against particular statutory provisions relating to the conduct of such districts enacted subsequent to the adoption of the constitutional amendment before the court would be justified in declaring them invalid. *Wores v. Imperial Irrigation Dist.*, 193 Cal. 609, 622, 227 P. 181.

Our conclusions herein are not opposed to the holding in the case of *Reclamation District v. Birks*, 159 Cal. 233, 113 P. 170, relied upon by the petitioners. The present case does not involve a "sale" of improvements from one district to another as was contemplated by the action of the trustees of the reclamation district in the cited case. It was held in the *Birks* Case that one district may not acquire property of another and impose upon the property owners payment of the debts of the one from which the property has been acquired unless the land so burdened will derive a commensurate benefit therefrom. The result in that case has been obviated here by the action of the legislature declaring in effect that the lands so to be burdened have been or will be benefited by the transfer of the specified property. The same distinction supported the validity of an act which authorized the transfer of properties from a smaller to a larger district in the case of *Barber v. Galloway*, 195 Cal. 1, 231 P. 34. The case of *City of Redwood City v. Myers*, 7 Cal.2d 283, 60 P.2d 291, 108 A.L.R. 727, does not support the petitioners' position. That case involved the validity of the Municipal Invest-

ment Bond Act (Stats.1915, p. 109), which purported to permit the municipality to levy an assessment for the purpose of issuing bonds the proceeds of which were to be used for purchasing and retiring improvement bonds of the city or its improvement districts. In line with the case of Reclamation District v. Birks, supra, it was held that the legislature was without the power to authorize the imposition of a tax upon all the lands in the municipality for the purpose of retiring a bond issue, the proceeds of which were to be used for purchase of such bonds; that the permanent purchase of bonds merely to effect their retirement and as a relief measure was not a beneficial use of the proceeds of the bond issue within the holding of the Birks Case.

Our conclusion herein that the statute involved is valid also finds support in Palo Verde Irrigation District v. Seeley, supra. In that case the writ of mandate directed the respondent to sign refunding bonds pursuant to the Palo Verde Irrigation District Act (Stats.1923, p. 1067.) That act provided for the organization of the Palo Verde Irrigation District which comprised and joined the territory and functions of three former independent agencies, a levee district, a drainage district, and a mutual water company. The legislature expressly declared that all of the improvements of each former district were uniformly advantageous and beneficial to all the lands of the new district. The refunding bonds were issued pursuant to an amendment of 1925 (Stats.1925, p. 637), for the purpose of redeeming the bonds of all three districts. The power of the legislature to authorize the imposition of the obligation upon the larger district to pay for improvements constructed within the smaller districts was upheld. The respondents there contended that in fixing the boundaries of the smaller district it must have been determined that the lands included therein only and no others were benefited by the works there constructed. But the contention was considered unavailing. The court said (245 P. page 1096): "It may well happen that by the extension of the original plans lands which would not be benefited by the original construction work would derive a benefit, not only from the additional improvement, but from the original improvement as well." It is true that in that case the legislative declaration of benefit was express, but it is seen that the same effect

should obtain where, as here, from the nature of the enactment, the implication that the legislature so found is unmistakable and unavoidable.

[7] The statement in the case of Van De Water v. Pridham, 33 Cal.App. 252, 261, 164 P. 1136, that there is a radical difference between the purposes of the Drainage Act and the Flood Control Act, the purpose of the former being to dispose of the water as an injurious element and of the latter to conserve it as a beneficial agent, is not necessarily inconsistent with the conclusions herein expressed. It is not difficult to perceive that the object to be attained by the legislation here questioned, namely, the combination of the functions of drainage and flood control to the end that drainage waters may as well be conserved through the joint facilities of the drainage and flood control districts, is well within the legislative power.

The peremptory writ is denied and the alternative writ is discharged.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



26 Cal.App.2d 61
BOHN v. BETTER BISCUITS, Inc.

Civ. 10697.

Supreme Court of California.

June 17, 1938.

Courts 486

A petition for hearing in the Supreme Court after decision of appeal by District Court of Appeal would be denied, where in substance and effect the views expressed by the District Court of Appeal in its written opinion, with reference to the question at issue, correctly declared the conclusions in that regard that were reached by the Supreme Court.

In Bank.

Appeal from District Court of Appeal, First District, Division 2; E. P. Shortall, Judge.

Action by Ralph M. Bohn against Better Biscuits, Inc. From an adverse judgment, the defendant appeals. On petition for hearing in Supreme Court after decision of the appeal by the District Court of Appeal.

Petition denied.

Prior opinion, 78 P.2d 1177.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Cleveland R. Wright and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, for respondent.

PER CURIAM.

On consideration of the petition for hearing in this court after decision of the appeal by the District Court of Appeal, it appearing that, in substance and effect, the views expressed by the District Court of Appeal in its written opinion with reference to the question at issue, correctly declare the conclusions in that regard that have been reached by this court, it is ordered that said petition for hearing be and it is denied.



27 Cal.App.2d 155

Ex parte McDONOUGH.

Cr. 2026.

District Court of Appeal, First District,
Division 2, California.

June 16, 1938.

1. Officers ⇐103

Acts of an officer which are to be deemed as act of administration, and are commonly called "administrative acts" and classed among those governmental powers properly assigned to the executive department, are those acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body or such as are devolved upon it by the organic law of its existence.

[Ed. Note.—For other definitions of "Administrative Acts," see Words & Phrases.]

2. Officers ⇐107

An administrative officer may act without notice or hearing.

3. Bail ⇐60

The fact that the statute requiring a bail bond broker to obtain permit from insurance commissioner did not provide for notice to be given to the applicant for the permit or for hearing on the application did not invalidate the statute which was purely administrative in character. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

4. Bail ⇐60

The statute requiring a bail bond broker to obtain a permit from insurance commissioner, which authorized the granting of permit only to parties of good moral character, who were fit and proper persons to engage in the bail business, was not invalid on the ground that there was no standard prescribed for guidance for actions of insurance commissioner; the standard provided being sufficient in view of fact that the statute was administrative in character. St. 1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

5. Bail ⇐60

The statute requiring bail bond brokers to obtain permits from the insurance commissioner was not invalid because it failed to provide for right of appeal or judicial review, since the statute did not authorize insurance commissioner to render a final judgment, and access to courts to correct arbitrary action on the part of commissioner could be had. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28; St.1935, p. 775, § 12940.

6. Bail ⇐60

Constitutional law ⇐48, 70(3)

The provision of the statute requiring applicant for bail bond broker's permit to tender a bond "conditioned upon the proper application and disposal of all moneys collected and received" by applicant could not be declared by the court to be unreasonable when applied to a broker engaged in making deposits instead of putting up undertakings of bail, since the Legislature had right to determine the reasonableness of the provisions and court would presume that the Legislature found cause for enacting the statute. St.1937, pp. 1797-1799, §§ 1830.20, 1830.24, 1830.25, 1830.28, 1830.34.

7. Bail ⇐60

The statute requiring bail bond brokers to obtain permits from insurance commissioner was not an improper exercise of police power, because of requirement that bail

bond broker be of good moral character and a fit and proper person, since the general public is materially interested in the subject of bail and in seeing that bail bond brokers conform to their obligations. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

8. Statutes ☞211

The chapter and sectional headings and marginal notes contained in the codes are considered as integral parts of the codes.

9. Statutes ☞121(1)

The statute requiring bail bond brokers to obtain permits from insurance commissioner was not unconstitutional on ground the title did not indicate the entire subject matter of the statute, because the title did not specifically mention deposits instead of bail included in the subject matter of the statute, since word "bail" as used in the statute was used in its general meaning, so as to include deposits instead of bail. St. 1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28; Const. art. 4, § 24.

[Ed. Note.—For other definitions of "Bail," see Words & Phrases.]

10. Habeas corpus ☞25(1)

A writ of habeas corpus would not lie to obtain the discharge of a bail bond broker's permit applicant, whose application was denied and who was indicted for conspiracy to violate the statute requiring the permit, on the ground that the statute was administered as to the applicant arbitrarily and capriciously and that the applicant thus lost valuable property rights. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28; Const. art. 4, § 24; U.S.C.A.Const. Amend. 14.

11. Mandamus ☞87

A writ of mandate would lie against the insurance commissioner on behalf of an applicant for a bail bond permit, if the insurance commissioner administered the statute requiring the permit arbitrarily and capriciously. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

12. Equity ☞43

A court of equity will not take jurisdiction when the party seeking relief has a complete remedy at law.

13. Injunction ☞89

An injunction would not lie to restrain the insurance commissioner from administering the statute requiring bail bond bro-

kers to obtain permits from insurance commissioner, even if the commissioner arbitrarily or capriciously administered the statute, since the applicant had an adequate remedy at law by applying for writ of mandate. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

14. Mandamus ☞168(3)

In a mandamus proceeding for purpose of obtaining a bail bond broker's permit, the issue would be required to be heard and determined under legal rules of evidence and in accordance with the facts as proved, where the statute requiring bail bond brokers to obtain permits did not provide for hearing before the administrative officer and did not provide nor authorize final determination by such officer. St.1937, pp. 1797, 1798, §§ 1830.20, 1830.24, 1830.25, 1830.28.

Proceeding in the matter of the application of Peter P. McDonough for a writ of habeas corpus to secure the discharge of the petitioner who was charged with conspiring to violate the law requiring a person dealing in bail bonds to obtain a permit from the commissioner of insurance.

Application for writ of habeas corpus discharged and petitioner remanded.

Leon Samuels and Charles H. Brennan, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Neil Cunningham, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus. The petitioner is charged with the crime of conspiring to violate chapter 8, division 1, part 2 of the Insurance Code. Stats.1937, p. 1797, ch. 653. The petitioner claims that in every respect, so far as his alleged offense is concerned, said chapter 8 is unconstitutional and void.

For many years prior to 1937 many different persons, natural and artificial, had been engaged in providing, for compensation, bail bonds in criminal cases. The petitioner had been so engaged for a period of thirty years and had built up an established business at a fixed place of business in the city and county of San Francisco. During the session of the legislature held in the year 1937, chapter 653 was enacted and took

effect August 27, 1937. The material parts of said statute are in part addressed to the proprietor of the business and, secondly, his agents and solicitors. The pertinent sections are:

"1830.20. A person shall not write or furnish bail bonds for compensation nor engage in the bail bond business in the State of California without first securing a permit so to do from the commissioner."

"1830.24. The commissioner may issue a written permit to any person wishing to engage in the bail bond business upon application therefor accompanied by proof that the applicant is a fit and proper person to engage in such business."

"1830.25. The commissioner may issue a permit to act as agent or solicitor for any person engaged in the bail bond business upon written application therefor on form prescribed by the commissioner, furnishing therewith proof that such applicant is of good moral character and is a fit and proper person to engage in such occupation."

"1830.28. The commissioner may refuse to issue any permit applied for unless it is made to appear that the applicant therefor is of good moral character and a fit and proper person to engage in the bail bond business."

The power to revoke is not now involved and need not be discussed in this decision. In no place is it provided that notice will be given, that a hearing will be had, that an examination will be made, that any record of such examination will be made, or that any adjudication will be had.

Soon after the statute took effect a controversy arose as to whether the petitioner was subject to the provisions of said statute. Thereafter such acts were done by the petitioner that on the 25th day of March, 1938, an indictment was returned against him charging him with the commission of the above-mentioned offense. Later he applied for a writ of habeas corpus.

The petitioner contends that his business is a valuable property right, that it is a lawful business, that he has a right to contract, that the exercise of the police power is constitutional only when promoting safety, health, morals, and general welfare, and that his rights will be protected under the provisions of the due process clause of the Fourteenth Amendment to the Constitution of the United States. U.S.C.A.Const. Amend. 14. Those claims will be conceded, but the question remains as to whether under the facts he has been in any manner

deprived of any right under the due process clause of said amendment.

[1-5] Earnestly contending that chapter 653 of the Statute of 1937 purports to vest in the insurance commissioner power to hear and determine certain questions of fact, the petitioner contends that the statute does not provide for notice to be given to him or a hearing to be had on his application, that it does not provide a standard governing the actions of the insurance commissioner, and it fails to provide for right of appeal or judicial review. On its face the statute does not purport to authorize the insurance commissioner to hear and determine any question of fact. The function which the insurance commissioner performs is almost identical with the function performed by the county clerk when a litigant appears tendering his papers and asking for a summons, a writ of attachment, a writ of replevin, etc. In *McKevitt v. City of Sacramento*, 55 Cal.App. 117, at page 124, 203 P. 132, at page 136, the court said: "Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence." They are commonly called administrative acts. See 2 C.J.S. p. 56, and numerous cases cited. But the authorities are numerous that no notice or hearing is required before an administrative officer acts. *State Board of Milk Control v. Newark Milk Co.*, 118 N.J.Eq. 504, 179 A. 116. In that case at pages 125, 126 the court said: "In the absence of a specific constitutional or statutory requirement thereof, notice of proceedings before the subordinate body exercising, as here, the administrative function is not requisite to valid action by that body. Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement; and, for obvious reasons, the like clauses in the state Constitution bear the same construction. As pointed out, the respondent board merely exercises the administrative function to effectuate the definitely declared legislative policy. Such regulation is purely a legislative function; and, even when exercised by a subordinate body, upon which it is conferred, the notice of hearing essential in judicial proceedings is not indispensable to a valid exercise of

the power. If the regulation undertaken is arbitrary or unreasonable, and, in the case of rates and charges imposed upon a business clothed with a public interest, confiscatory, relief may be had in the courts. A judicial review of administrative proceedings, on notice, satisfies the demand of the due process clauses. *Home Telephone, etc., Co. v. Los Angeles*, 211 U.S. 265, 29 S.Ct. 50, 53 L.Ed. 176. The principle of due process is to secure the citizen against the exercise of arbitrary power. "The omission (in a statute conferring such power upon a public utility commission) of the requirement of notice assimilates the procedure of the Commission to that characterizing legislative action, and it is justified and sustained by those reasons of public policy upon which notice is dispensed with in legislation." *Randall Gas Co. v. Star Glass Co.*, 78 W.Va. [252] 253, 88 S.E. 840, 842. See, also, 12 C.J. 1240, 1268, 1269, 1282; 51 C.J. 57." The petitioner cites and relies on *In re Lambert*, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am.St.Rep. 296, and kindred authorities. They are not in point because each of them discussed statutes which purported to authorize the rendition of judicial or quasi-judicial determination. Nor do we find any merit in the contention that the statute is invalid because no standard is prescribed for the guidance of the actions of the insurance commissioner. In several places the language is used that an applicant "is of good moral character and is a fit and proper person". Bearing in mind that we are construing a statute that is purely administrative, the standard quoted is sufficient. The question is not an open one in this state. Almost the same phrase was used in the statute regulating the business of acting as real estate brokers, etc. *Stats.1919*, p. 1252. In the case entitled *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, the same contention was made that is made in the instant case. The point was carefully considered and the provisions of the statute were upheld. The same conclusion was reached on the same point in *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 553, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, *Ann.Cas.1917C*, 643. The other attack on the validity of the statute because it fails to provide for right of appeal or judicial review may not be sustained. If, as contended by the petitioner, the statute authorized the insurance commissioner to render a final judgment, then his point might be sound, "But the statute under consideration does not attempt to circum-

scribe the powers of a court, and it is not invalid simply because it does not specifically provide for access to the courts. Such access always exists if there is any arbitrary action on the part of the Legislature or of a legislative agency which deprives a citizen of his constitutional rights." (Citing cases.) *Highland Farms Dairy v. Agnew*, D.C., 16 F.Supp. 575, 585. Furthermore section 12940 of the Insurance Code, *St.1935*, p. 775, provides: "Review. The acts and orders of the commissioner are subject to such review, or other action by a court of competent jurisdiction, as is permitted or authorized by law."

[6] Chapter 1, title 10, part 2 of the Penal Code (secs. 1268-1317) is entitled "Bail". That chapter is divided into eight articles. Articles 1-4 specify when a defendant may be admitted to bail. Article 5 is headed "Deposit Instead of Bail". Articles 6, 7 and 8 are addressed respectively to "Surrender of the Defendant," "Forfeiture of the Undertaking of Bail or of the Deposit of Money," and "Recommitment of the Defendant, After Having Given Bail or Deposited Money Instead of Bail". The petitioner calls attention to the provisions of section 1830.34, which requires an applicant to tender a bond "conditioned upon the proper application and disposal of all moneys collected or received" by the applicant. He then asserts that the requirement that a bail bond broker engaged in making deposits instead of putting up undertakings of bail is "unreasonable and unnecessary". He does not claim such a provision is unconstitutional. Nor does he claim his business is wholly that of making deposits instead of bail. Art. 5. Nor does he claim that the alleged wrongful act on which the indictment was based was an act of making a deposit instead of bail. Moreover, a reading and comparison of the provisions of the several articles comprising the chapter on bail discloses such an intermingling of rights and remedies that we are unable to say that, in the absence of specific authority, the general language contained in chapter 8 of the Insurance Code improperly included those persons engaged wholly or in part in making deposits instead of bail. As noted above the bail provided for in articles 1, 2 and 3 consists wholly of written undertakings. That provided for in article 4 may be cash, bonds, or equity in real estate—all furnished by a bail bond broker, or by the defendant personally. It was conceded at the oral argument that if

a bail bond broker puts up an undertaking, cash, state or federal bonds, or an equity in real estate, it is the usual practice for him to require a deposit with him of collateral to protect him against loss. The petitioner's attack is reduced to the question: "Is the requirement, to put up a bond conditioned upon the proper application and disposal of such collateral, "unreasonable and unnecessary"? We think a court may not as a matter of law answer that question; but it was for the legislature to determine the facts and act thereon. We must presume the legislature found cause for enacting section 1830.34 of the Insurance Code.

[7] Pointing to the clause "of good moral character and is a fit and proper person", the petitioner contends that it has no pertinency to the general subject matter of the statute and is therefore an improper exercise of the police power. Conceding that the subject matter was approved in *Riley v. Chambers*, supra, the petitioner contends that in the case cited the court based its ruling on the fact that there was a certain fiduciary relation existing between a real estate agent and his client. Continuing the petitioner contends that the same reasoning is not applicable to a bail bond broker. We think it is. It is sufficient to state that the general public is materially interested in the whole subject. The public is interested in seeing that those entitled to give bail are allowed to do so; that when bail is given that it should be good bail and not otherwise; that the person admitted to bail conform to his obligations and appear duly when directed by the court to appear; and that in default the bail be promptly paid according to the obligation of the contract.

[8, 9] Again the petitioner contends that chapter 653, Statutes of 1937, is invalid as being in violation of section 24 of article 4 of the state Constitution, that is, that the title does not indicate the entire subject matter of the statute. In support of the point he calls to our attention that the Penal Code has sections dealing with the subject of "bail", that it also has other sections addressed to the subject of "deposits instead of bail". He then argues that although said chapter 653 specifically mentions bail that it does not specifically mention deposits instead of bail. We find no merit in the point. Bearing in mind that chapter and section headings and mar-

ginal notes contained in the codes are integral parts of the codes (23 Cal.Jur. 772), it is only necessary to turn to title 10, part 2 of the Penal Code to be convinced that the word "bail" is at times used in said code to include not only undertakings of bail, but also deposits made instead thereof. We think it is clear therefore that the word "bail" as used in chapter 653 was used in its general meaning and not in the limited meaning specified by the petitioner.

[10-13] Finally the petitioner claims that the statute has been, as to him administered arbitrarily and capriciously both by the insurance commissioner and the courts and that he has thereby been deprived of a valuable property right, that is, the right to conduct an established lawful business and occupation. Continuing he asserts such facts entitle him to apply for a writ of habeas corpus and that the courts should adjudge that the statute is invalid under the due process of law clause of the fourteenth amendment to the federal Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. That case is not in point. It involved the validity of two ordinances of San Francisco. It was contended and the court held that the ordinances were invalid by reason of the manner of their administration. That holding was based on the fact that, on their face, the ordinances purported to show that all questions of fact had been determined by the board of supervisors; that the determinations of the board were final; that the Supreme Court of this state so held; that the federal circuit court held that it was bound by the construction which the Supreme Court of this state placed on its statutory enactments; and that by reason of such administration of said ordinances by the board of supervisors and by the courts the petitioners were being deprived of their property rights in violation of the fourteenth amendment. But in the instant case there is nothing on the face of chapter 8, supra, showing that the legislature had determined all of the facts; that the action by the insurance commissioner is final; that the courts have so held; or that application has been made to any court in any proceeding except in a habeas corpus proceeding and an application for an injunction. If, as claimed by him, the insurance commissioner has administered the statute arbitrarily and capriciously, the petitioner's remedy is to apply for a writ of mandate. Tu-

lare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874. In the rulings of the courts of which the petitioner complains we find nothing in excess of jurisdiction and neither do we find any error. Those rulings consisted of two applications which were denied. The petitioner applied to the superior court for a writ of habeas corpus. He made the same contentions in that proceeding he has made in this proceeding. The writ was denied. There was nothing arbitrary or capricious in the ruling. He also commenced an action to obtain an injunction to restrain the insurance commissioner from administering the statute. An injunction was denied. It is difficult to see how the ruling could have been otherwise. Under fundamental rules a court of equity will not take jurisdiction when the party has a complete remedy at law. In the instant case the petitioner has a plain, speedy, and adequate remedy as we have shown above.

However, the petitioner vigorously contends that mandamus is not the proper remedy. He cites and relies on cases containing language to the effect that the writ will not issue to control discretion. He then points to the statutory provisions that the insurance commissioner may issue a permit or refuse one. He then argues that a proceeding in mandamus is not his proper remedy. In *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am.St.Rep. 249, these identical contentions were made. Mr. Commissioner Hayne, with his characteristic ability and industry, made an exhaustive study of the authorities. His opinion was adopted by the court. Commencing on page 553, 18 P. on page 770, we quote the conclusions as follows: "In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action, or to compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and, if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states. But the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so. In every case the tribunal that

is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue." The doctrine of that case has not, we believe, been departed from in any single case. On the other hand, it has been cited and followed in a long line of cases, one of the later ones being *Landsborough v. Kelly*, 1 Cal. 2d 739, at page 744, 37 P.2d 93, 96 A.L.R. 707. By reason of the similarity of the statutes involved we cite, in particular, the case entitled *Tulare Water Co. v. State Water Comm.* supra. Commencing on page 537, 202 P. on page 876, the court said: "While it appears from the provisions above quoted that the act is intended to authorize an investigation, and the exercise of some degree of discretion by the Water Commission as to the sufficiency of the application, and as to the existence of water subject to appropriation, no formal hearing is prescribed, and no authority granted to judicially determine the fact as to unappropriated water, or to adjudicate conflicting claims that might exist thereto. * * Under such conditions mandamus is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act. It is well settled that mandamus will issue to correct an abuse of discretion, if the case is otherwise proper. *Wood v. Strother*, 76 Cal. 545, 18 P. 766, 9 Am.St.Rep. 249; *Ex parte Bradley*, 7 Wall. [364] 377, 19 L.Ed. 214; [see, also, *Rose's U. S. Notes*]; *State v. Lafayette County*, 41 Mo. [221] 226; *Village of Glencoe v. People*, 78 Ill. 382; *People v. Superior Court*, 10 Wend. (N.Y.) 285; *Hammel v. Neylan*, 31 Cal.App. [21] 22, 159 P. 618. As in all cases of ministerial duty, the obligation to perform depends upon the determination of the existence of certain prerequisite facts, but, where such facts exist, the duty is mandatory. Mere authority to decide as to the existence of a given fact does not neces-

sarily take the official or board so deciding beyond the reach of a writ of mandate, especially where there is no remedy by appeal."

[14] As we have held that the petitioner's remedy is to apply for a writ of mandamus, it is appropriate to comment in brief on the proof that may be offered and received in that proceeding. In the record before us it appears that when the petitioner applied for a permit the insurance commissioner held a hearing. At that hearing the petitioner contends the insurance commissioner received evidence on the issue whether the applicant was "of good moral character and a fit and proper person". It is further contended that evidence for and against the applicant was so received. The record does not disclose what that evidence was. However, the petitioner contends that there was no evidence that justified the insurance commissioner in refusing petitioner a permit. Where, as here, the statute does not provide for a hearing before the administrative officer and does not provide nor authorize a final determination by such officer, in any mandamus proceeding commenced for the purpose of obtaining a writ commanding the issuance of a permit the issue must be heard and determined in the mandamus proceeding under legal rules of evidence and in accordance with the facts as proved. *Wood v. Strother*, supra. That case involved these facts. A street assessment proceeding had been had. Strother was the auditor. The statute, St. 1871-72, p. 813, § 10, provided that the warrant should be countersigned by the auditor, "who, before countersigning it, shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair". A writ issued. The auditor alleged that he was not "satisfied", etc. After hearing the evidence in the mandamus proceeding the court made a finding that the street assessment proceeding had "been legal and fair". On appeal that finding was sustained and enforced. Where, as here, the action of the administrative officer was not intended to be final, the rule stated in *Wood v. Strother*, supra, controls.

We think it is clear that the statute before us is not vulnerable to any of the attacks made by the petitioner, that it is not invalid, and that the petitioner is not illegally restrained of his liberty.

The application for a writ of habeas corpus is discharged and the petitioner is remanded.

We concur: NOURSE, P. J.; SPENCE, J.



27 Cal.App.2d 768
Ex parte RICE.
Cr. 2027.

District Court of Appeal, First District,
Division 2, California.
June 16, 1938.

Bail ☞60

Habeas corpus ☞32

The statute relating to bail bond brokers, which required agents and solicitors of brokers to obtain a license was valid, and hence habeas corpus would not lie to obtain discharge of a license applicant charged with conspiracy, to violate the statute, after denial of the application without notice or hearing. St.1937, p. 1797, § 1830 et seq.

Proceeding in the matter of the application of Harry T. Rice for writ of habeas corpus to obtain the applicant's discharge.

Writ of habeas corpus discharged and petitioner remanded.

Leon Samuels and Charles H. Brennan, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Neil Cunningham, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

This is an application for a writ of habeas corpus. With few exceptions the facts are the same as in the proceeding entitled *In the Matter of the Application of Peter P. McDonough for a Writ of Habeas Corpus*, Cal.App., 80 P.2d 485, the decision in which was this day filed. Instead of being one of the proprietors of a bail bond business, this petitioner is an employee of such proprietors, the McDonough Bros. He applied for a license under chapter 8, division

1, part 2 of the Insurance Code, St.1937, p. 1797, § 1830 et seq., to act as an agent and solicitor. His application was denied without notice or a hearing. Otherwise the material facts are the same. The difference in the facts is not sufficient to change the rule. We think the decision mentioned is controlling.

The writ of habeas corpus is discharged and the petitioner is remanded.

We concur: NOURSE, P. J.; SPENCE, J.



27 Cal.App.2d 91

KRUG v. JOHN E. YOAKUM CO. et al.
Civ. 6004.

District Court of Appeal, Third District,
California.

June 10, 1938.

Rehearing Denied July 9, 1938.

Hearing Denied by Supreme Court
August 8, 1938.

1. Appeal and error ⇨66

Appeal does not lie from an interlocutory judgment.

2. New trial ⇨3

Where court entered what it called an "interlocutory decree" that referee's report on referred issues was to stand as court's finding and that court should enter final judgment when report was filed with clerk, court could grant motion for new trial when mere entry of judgment remained to be done, as against contention that court had not entered a final decree so as to authorize granting of new trial. Code Civ.Proc. §§ 632, 656.

3. New trial ⇨3

The "findings" of the court constitute the "decision" as respects time for moving for new trial. Code Civ.Proc. §§ 632, 656.

[Ed. Note.—For other definitions of "Decision" and "Finding," see Words & Phrases.]

4. New trial ⇨3

A motion for new trial may be made and heard before the entry of judgment. Code Civ.Proc. §§ 632, 656.

5. Appeal and error ⇨907(2)

Where testimony was not brought up on appeal, trial court's finding was presumed to be supported by evidence.

6. Mortgages ⇨32(3)

A deed which is absolute in form will be held to be only a mortgage when given for purposes of security.

7. Judgment ⇨72

Consent judgments are valid.

8. Judgment ⇨785(1)

A judgment which has been entered by collusion between the parties will be disregarded as respects rights and liens held by third persons.

9. Mortgages ⇨178

Where plaintiff loaned money to Y for payment of incumbrances on realty during litigation between Y and G regarding title thereto, plaintiff received deed to realty as security, and, upon inability of plaintiff to furnish sufficient money, third party made loan to Y and G and title to realty was transferred to trust company for sale and payment of incumbrances, Y and G also agreeing to a partition and consenting to entry of judgment quieting title in G instead of in Y as decreed by trial court, so that record title would appear vested in G because of fact that litigation was commenced before deed to plaintiff was executed, priority of plaintiff's lien was not thereby avoided.

10. Trusts ⇨265

Where plaintiff loaned money to Y for payment of incumbrances on realty during litigation between Y and G regarding title thereto, plaintiff received deed to realty as security, and, upon inability of plaintiff to furnish sufficient money, third party made loan to Y and G and title to realty was transferred to trust company, for sale and payment of incumbrances including plaintiff's lien, Y and G also agreeing to a partition and consenting to entry of judgment quieting title in G instead of in Y as decreed by trial court thereby attempting to avoid plaintiff's lien, trust company was personally liable to plaintiff for amount of plaintiff's loan.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Olive Krug against the John E. Yoakum Company and others to enforce an equitable lien on realty based on loans made by plaintiff for payment of incumbrances on the realty, wherein certain of the defendants sought to recover damages for plaintiff's failure to make a sufficient

loan. From a decree awarding plaintiff a sum in excess of \$32,000, less damages in a sum in excess of \$8,000, and a lien upon certain of the realty, defendants appeal.

Affirmed.

Alfred E. Cate and W. W. Kaye, both of Los Angeles, for appellants.

Samuel W. Newman, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal from a decree of the trial court awarding the plaintiff a sum of money somewhat in excess of \$32,000, less damages in a sum of money somewhat in excess of \$8,000, and a lien upon certain properties, the title to which stood in the name of the defendants Yoakum at the time of the execution of the agreement herein-after mentioned.

In April, 1924, and for some time prior thereto, the appellants in this action were known as, and are hereinafter described as the "Yoakum Group" and the "Grimes Group". Both groups claimed an interest in real estate situate in the county of Los Angeles, and also in real estate situate in counties adjacent thereto, as well as in counties situate in certain portions of San Joaquin valley. Litigation had been begun between the groups to quiet title to said property. The litigation referred to terminated in the trial court quieting title in the Yoakum Group to certain lands situate in the county of Los Angeles. The litigation terminated in quieting title in the Grimes Group to all the lands situate in counties outside of Los Angeles.

It appears that in 1924, and prior to the month of April, there were certain liens and incumbrances upon the lands situate in the county of Los Angeles, the title to which, as we have said, was subsequently declared to be vested in the Yoakum Group. In April, 1924, the respondent and the Yoakum Group entered into an agreement under which the respondent undertook to advance moneys for the purpose of protecting the properties then in litigation from the effect of certain mortgages, street bonds, taxes, liens, etc. Under this agreement the respondent advanced the sum of \$32,483.24. To secure the respondent for the repayment of the moneys to be advanced by her, and which were advanced by her, the Yoakum Group, in pursuance of the agreement to which we have referred, executed a

deed conveying to her all of the property then in litigation.

Subsequent to the execution of the agreement to which we have referred, and also subsequent to the execution of the deed just mentioned, the decree quieting title in the Yoakum Group to the Los Angeles real estate was entered; likewise, the decree quieting title in the Grimes Group to all of the real estate outside of Los Angeles county was entered. The Yoakum Group appealed from the decree quieting title in the Grimes Group, and the Grimes Group appealed from the decree quieting title in the Yoakum Group. For some reason not disclosed by the record the respondent was not able to furnish all the money that was required to pay off the mortgages, liens and incumbrances on the Yoakum properties. It appears that something over \$100,000 was requisite for that purpose, and thereafter an agreement was entered into between the Title Guarantee & Trust Company and E. W. Sargent and the Yoakum Group and Grimes Group, by virtue of which Sargent was to loan the Yoakum Group the sum of \$110,000, and the title to the properties was transferred to the Title Guarantee & Trust Company for the purpose of executing the trust, to-wit: Sale of the property and payment of the incumbrances thereon. As a part of the same transaction it appears that the Yoakum Group and the Grimes Group agreed to settle their differences and partition among themselves the several parcels of property which formed the subject matter of the litigation.

In order that the Title Guarantee & Trust Company might be able to give purchasers a clear title, a stipulation was entered into by virtue of which the appeal in the Yoakum case should be reversed by the Supreme Court, and the trial court directed to enter a decree quieting title to the Los Angeles property in the Grimes Group. When the loan was discharged the Yoakum Group was to get the Los Angeles properties, and the Grimes Group, the other properties. The appeal in the Grimes case was also to be dismissed. Upon the record the title to the Los Angeles property would thus be made to appear as vested in the Grimes Group, by reason of the fact that the litigation begun by the Yoakum Group to have title to the Los Angeles property vested in the Yoakum Group, preceded the agreement which was entered into between the plaintiff and the Yoakum Group, under which the plaintiff advanced a sum some-

what in excess of \$32,000. Thereafter, the Title Guarantee & Trust Company proceeded to sell portions of the real estate herein referred to and obtained therefrom sums of money in excess of \$100,000.

The respondent had judgment for the foreclosure of what the court determined to be an equitable mortgage or lien upon the Yoakum properties, and also held that the transactions which we have just mentioned were taken and had for the express purpose of defeating the claim or lien of the respondent, and thus enabling the Yoakum Group to escape repayment of the sums of money advanced by the plaintiff, and also enabling all of the defendants to escape any liability for and on account of any lien held by the respondent upon the Yoakum properties.

The declaration of trust covering the situation, which appears not to have been recorded, shows that the Title Guarantee & Trust Company was not fully satisfied that the proceedings taken had eliminated the lien of the respondent, and therefore, in its declaration of trust, set forth that the conveyance was made subject to certain incumbrances, among which was the deed and agreement heretofore referred to, and that the Trust Company held the property in trust for the Yoakum Group as beneficiaries and Mr. Sargent as payee, subject to the specific trust thereafter enumerated, to-wit: As security for the repayment of the moneys borrowed from Mr. Sargent, and as security for any money that may be due to Olive Krug, the respondent in this action.

Instead of seeking to rescind for failure of the respondent to furnish all the money necessary to pay off the liens on the Yoakum properties, the Yoakum Group in this action sought to recover damages. The trial of the action was had, the court made its findings and entered a decree called an interlocutory decree, and referring to a referee the question of damages, but specified that the findings of the referee shall stand as the findings of the court upon the matters referred to said referee, and that upon the filing of the findings of the referee with the clerk, this court shall enter its final judgment in the action. After the referee's report had been returned and approved by the court, thus terminating all of the findings to be made by the court and every action to be taken by the court save and except the simple entry of judgment thereon, the plaintiff or respondent in this

action made a motion for a new trial, which was granted for the specific purpose of determining the priority of the liens to which we have referred, and especially the priority of the respondent's lien over the transactions had by the Yoakum and Grimes Groups with Sargent and the Title Guarantee & Trust Company.

[1,2] The first ground urged for reversal herein is that no appeal lies from an interlocutory judgment. As an abstract proposition of law this is correct, but as applied to the instant case it is not correct. What we have stated shows that the action of the court stood as its findings and final decision as to all the facts, involved in the action, and nothing more remained to be done by the court, save the entry of judgment.

Section 632 of the Code of Civil Procedure shows clearly that the decision of the trial court consists of a making and filing of findings by which the facts are determined, and upon which conclusions of law are based, after which a judgment may be entered.

[3,4] Section 656, *supra*, specifies that a new trial is a re-examination of the issues of fact in the same court, after a trial and decision by a jury, court or referee. This would seem to be a complete answer to the appellants' contention. However, it has been repeatedly held that under our present system the findings constitute the decision. *Dominguez v. Mascotti*, 74 Cal. 269, 15 P. 773; *Estate of Barker*, 207 Cal. 112, 276 P. 992; *Brison v. Brison*, 90 Cal. 323, 27 P. 186. In the *Brison* Case the opinion takes up and discusses what constitutes the decision of the trial court and as constituting a basis for a motion for new trial. Likewise, the courts hold that the motion for new trial may be made and heard before the entry of judgment. *Spanagel v. Dellinger*, 34 Cal. 476; *Brison v. Brison*, *supra*; *Johnson v. Phenix Insurance Co.*, 152 Cal. 196, 92 P. 182. The cases cited by the appellant are not controlling here for the simple reason that in every one of them there remained something more for the court to do before judgment could be entered.

Upon the second hearing or trial of this cause it was adjudged that the lien held by the respondent was prior to the claims of any of the defendants; it was likewise held, and the findings of the court so state upon the first hearing, that the deed given to the plaintiff was given to her as security.

[5,6] As the testimony is not brought up upon this appeal, this finding must be presumed to be fully sustained by the evidence. In fact, in one of the answers filed by the Yoakum defendants it is set forth that after the execution of the deed and agreement which we have referred to, "that plaintiff thereafter held the title to all of said properties in trust for the use and benefit of these defendants and as security to the plaintiff for the sums of money which she agreed to advance pursuant to the terms of said agreement". We do not need to cite authorities to the effect that a deed, absolute in form, will be held to be only a mortgage when given for the purposes of security. That the actions to quiet title were begun prior to the execution by the Yoakum Group of the agreement with the respondent, and also the delivery by the Yoakum Group to the respondent of the deed to which we have referred, has no material value upon the issues involved herein, and therefore the inadvertent use of the word "subsequent" instead of the word "prior" in finding IV, is disregarded. The real bone of contention in this action is the procedure taken by the Yoakum and Grimes Groups, the defendants, E. W. Sargent, and the Title Guarantee & Trust Company, to circumvent the lien of the respondent and escape repayment to her of the sums theretofore advanced by the respondent, as stated herein.

[7] The appellants advance the argument, and cite numerous authorities to the effect that consent judgments are valid. With this statement, or with this position taken by the appellants, we fully agree, but it does not follow that a consent judgment for the purposes of circumventing a lien held by a third person is effective to accomplish that purpose.

[8,9] We do not find that the appellants seriously contend that the findings of the court are not sufficiently supported by the testimony, to the effect that the proceedings which we have detailed were taken for the express and specific purpose of avoiding, if possible, the claims of the respondent. The history of the proceedings is fully set out in the transcript, and is too lengthy to be incorporated in this opinion, but we think a reading of such proceeding establishes clearly that the findings of the trial court are sufficiently sustained by the testimony. Nor do we need to review at length the many cases holding that where a

judgment has been entered by collusion between the parties that it will simply be brushed aside as of no force or effect as to the rights and liens held by third persons. We need cite only one case, to-wit: Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542. In that case it appears that the California Development Company was organized under the laws of New Jersey, for the purpose of diverting waters of the Colorado river, and by a series of canals, conveying the same to the Imperial valley. To carry through this project it borrowed approximately \$500,000, for which it issued a series of bonds, which were secured by a trust deed to the Title Insurance & Trust Company, under which there was conveyed and transferred to that trust company all of the land in California and all of the stock which the parent company owned in the Mexican company. In 1904, during a flood-tide in the waters of the Colorado river, a break in one of the levies occurred and the water poured through the break and found its way into the Salton sink, the lower land of which was owned by the New Liverpool Salt Company. This company suffered loss, brought suit for damages, and obtained a judgment in excess of \$450,000. The development company was unable to stay the flow of the water. It applied to the Southern Pacific Company and was granted a loan embodied in a contract under date of June, 1905, under the terms of which the Southern Pacific Company was put in practical charge, and advanced a sum amounting to approximately \$1,000,000. After the Southern Pacific Company was put in charge of the property, which included both the American and Mexican properties, and for the purpose of preventing an enforcement of the Salt Company judgment, it brought two actions against the Mexican company, one for \$950,000 and another for \$650,000. By consent between the Southern Pacific Company and the Mexican Company, judgment was confessed in favor of the Southern Pacific Company for both of the aforesaid amounts, and under the judgment for \$650,000 it caused an execution sale to be had of all the properties lying in Mexico. Its object was to prevent the enforcement of the Salt Company's judgment and the sequestration of the Mexican property by the Title Insurance Company as pledgee of the shares of stock of the Mexican Company. In deciding the case the court used the follow-

ing language: "If, as a result of a collusive consent judgment, one has acquired the title to real estate, equity will treat the defrauded party, with respect to all of the fruits and benefits obtained by the colluding party as being a trustee for the defrauded party, with respect to all of the fruits and benefits obtained by the colluding party from the consent judgment. In a foreclosure, equity will brush aside the consent judgment and enforce the lien sought to be foreclosed, as if such consent judgment did not exist." The recital of the facts in the opinion in the case of *Title Insurance Co. v. California Development Company*, supra, covers too many pages for us to quote therefrom satisfactorily, but a reference thereto shows that every point presented in this case is covered and absolutely negatives the contentions made by the appellants, and establishes the fact that the proceedings taken and had in this case are insufficient to avoid the priority of the respondent's lien.

[10] Under the agreements and trust declaration by which the Title Guarantee & Trust Company has taken precautions to save itself harmless from any judgment that might be entered in favor of the respondent, we can perceive no real reason why the personal judgment against the Title Guarantee & Trust Company should not be upheld.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



27 Cal.App.2d 86

In re HARVEY'S ESTATE.

BOKOFSKY v. BROWN.

Civ. 11873.

District Court of Appeal, Second District,
Division 2, California.

June 10, 1938.

Hearing Denied by Supreme Court
August 8, 1938.

Executors and administrators ☞ 17(7)

The court was not required to appoint, as administrator with the will annexed, the

nominee of testator's nonresident sister who was a beneficiary under the will.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Proceeding in the matter of the estate of John Harvey, deceased, wherein Percy M. Bokofsky petitioned for letters of administration with the will annexed, which was contested by Ben H. Brown, public administrator. From an order denying the petition and granting letters of administration to the public administrator, petitioner appeals.

Affirmed.

David I. Lippert, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

Marshall Stimson and Noel Edwards, both of Los Angeles, amici curiae.

WOOD, Justice.

In this proceeding Percy M. Bokofsky appeals from an order of the superior court denying his petition for letters of administration with the will annexed and granting the petition of the public administrator of Los Angeles county. The bank named as executor declined to act. Appellant is the nominee of Susan Watts, surviving sister of the decedent and a beneficiary under the will, who resides in the state of Wisconsin.

Appellant contends that it was mandatory upon the probate court to appoint the nominee of the nonresident sister of the decedent. The issue involved has been decided adversely to appellant's contention in *Estate of Pardue*, 22 Cal.App.2d 178, 70 P. 2d 678, wherein the identical question was presented for determination and the court held (page 679): "It is evident that being a nonresident, and not being a surviving spouse, Carrie Phillips' request for the appointment of Marshall Stimson as administrator created no priority right and was not binding on the court." A petition for a hearing by the Supreme Court was denied in the *Pardue* Case. On the authority of that decision the order appealed from must be affirmed.

It is so ordered.

We concur: CRAIL, P. J.; McCOMB, J.

WEBSTER v. FREEMAN.**Civ. 5957.**District Court of Appeal, Third District,
California.

June 6, 1938.

Rehearing Denied July 5, 1938.

1. Pleading ⇨376

Where a complaint contains allegations of fact which are admitted by the answer, no issue is raised as to those facts.

2. Pleading ⇨229

The purpose of allowing an amendment is to correct errors and omissions on the part of the pleader.

3. Pleading ⇨236(2)

Permission to file an amendment after a cause is at issue rests in the discretion of the trial court.

4. Appeal and error ⇨959(1)

An abuse of discretion in permitting amendment to pleadings must be shown before Court of Appeal can act.

5. Pleading ⇨420(1)

An objection to the filing of an amended answer must be made at the time of the filing and not after entry of judgment.

6. Pleading ⇨127(2)

In action for wages, answer admitting employment of plaintiff but denying that any amount was owing for salary and alleging payment of certain sum was not an unqualified admission of indebtedness for wages in sum equal to difference between salary allegedly earned and amount admittedly paid so as to make employer liable in such amount.

7. Witnesses ⇨126

The statute providing that a party to an action against an executor upon a claim against the estate of a deceased cannot be a witness as to any matter of fact occurring before the death of deceased must be strictly construed. Code Civ.Proc. § 1880, subd. 3.

8. Witnesses ⇨133

The statute providing that a party to an action against an executor upon a claim against the estate of a deceased cannot be a witness as to any matter of fact occurring before the death of deceased does not apply to cases in which the executor brings the action. Code Civ.Proc. § 1880, subd. 3.

9. Witnesses ⇨133

In employee's action for wages against executor of estate, executor's counterclaim against employee for credits and cash advancements was an "action" by an executor, within rule that statute prohibiting party to action against executor on claim against estate from testifying does not apply to cases in which executor brings the action, so that refusal to permit employee to offer testimony in rebuttal of evidence in support of counterclaim was error. Code Civ.Proc. § 1880, subd. 3.

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Raymond G. Webster against William Freeman on a claim for wages. Before trial the defendant died and a supplemental complaint was filed against Frank William Freeman, as executor of the estate of William Freeman, deceased. From an adverse judgment, plaintiff appeals.

Reversed and remanded.

Erling S. Norby and A. B. Reynolds, both of Marysville, for appellant.

Manwell, Sperbeck & Manwell, of Marysville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was originally filed by plaintiff against William Freeman on a claim for wages.

The original complaint was in three counts, the first count being for services rendered by plaintiff to defendant between 1918 and 1934 or 70 months at \$100 a month, and alleged no part of the \$7,000 had been paid. The second count was based on an open book account for services in the sum of \$7,000, and the third cause of action was based upon an agreement whereby plaintiff undertook the care and management of defendant's farming interests, and was to receive \$100 a month, together with his living and traveling expenses; that plaintiff, relying upon the honesty and integrity of defendant, kept no books, but defendant did keep accurate books and plaintiff asked for an accounting between himself and defendant.

Defendant demurred, and the first cause of action was dismissed as barred by the

statute of limitations. In the answer the allegations of the second count were denied, and as to the third count defendant replied as follows:

"Answering the allegations of plaintiff's third cause of action defendant admits that plaintiff went to work for defendant on or about the 1st day of October, 1918, for \$100.00 per month, and that he continued his employment up until the first day of May, 1934, but defendant denied that he owes said plaintiff any sum of Seven Thousand Dollars (\$7,000.00) or any portion thereof but said defendant alleges that he has paid to and for the use and benefit of this plaintiff from the 23rd day of August, 1918, up to and including the 28th day of April, 1934, the total sum of Eleven Thousand Four Hundred Fifty-five and $\frac{7}{100}$ Dollars (\$11,455.07), in lawful money of the United States of America."

It is the contention of appellant that by this answer defendant admitted an unpaid balance of \$7,244.93, being the difference between the amount claimed by plaintiff and that defendant admits having been paid.

After this case was at issue, but before trial, William Freeman died, and an amended and supplemental complaint was filed. The supplemental complaint set up the death of Freeman and the appointment of Frank William Freeman as executor, and the amendment set up a cause of action in one count based upon an open, mutual and current account. The amended answer to this amended and supplemental complaint pleaded the statute of limitations, denied the material allegations of the amended complaint and set up a counter-claim for credits and cash advancements of a sum in excess of \$21,000. The trial court found that the counter-claim offset the amount owing to plaintiff, and entered judgment accordingly.

Upon this appeal appellant contends respondent is bound by the allegations in his original answer which he contends admits wages due to plaintiff in excess of \$7,000.

[1-6] There is no doubt that where a complaint contains allegations of fact which are admitted by the answer, no issue is raised as to those facts. *Beatty v. Pacific States S. & L. Co.*, 4 Cal.App.2d 692, 41 P. 2d 378. But where the original pleading is amended we must then rely upon that pleading. The purpose of allowing an amendment is to correct errors and omissions on the part of the pleader. So, too, permission to file an amendment after a

cause is at issue rests in the discretion of the court, and here the amended answer recites that after leave of court first obtained the amendment was filed. Amendments being largely within the discretion of the trial court, an abuse of that discretion must be shown before this court can act. No such showing is here made. Also if plaintiff wished to oppose the filing of an amended answer by defendant such objection should have been made at the time of filing and not raised after an adverse judgment had been entered. Also we cannot say from a reading of the allegations in the original complaint and the answer that the answer distinctly and unqualifiedly admits an indebtedness of \$7,000. Respondent contends the answer denies, and that the pleader intended to deny that there was any amount due and owing to plaintiff, and that he had paid over and above any amount claimed by plaintiff to be due in excess of \$11,000. In any event the trial court permitted the amended answer to be filed, and the cause was tried upon the issues thus framed.

Section 1880, subdivision 3 of the Code of Civil Procedure provides that a party to an action against an executor upon a claim against the estate of a deceased person cannot be a witness as to any matter or fact occurring before the death of such deceased person.

Appellant recognizes the limitations set forth in section 1880 of the Code of Civil Procedure, but contends that he should not have been precluded from offering testimony in rebuttal, after the executor had pleaded a counter-claim and presented evidence and proof thereon.

[7] Respondent attempts to point out various ways in which the rule as contended for by appellant would jeopardize the estate of a deceased person and how it would be left defenseless if the doors were open to permit a cross-defendant to testify as to facts occurring before the death of the deceased, but we can only interpret the statute as it is written, and this statute is to be strictly construed. *Myers v. Reinstein*, 67 Cal. 89, 7 P. 192.

[8,9] Respondent also contends the particular claim in the instant case was merely a defensive pleading and not for affirmative relief. We are compelled to the conclusion, however, that the counter-claim in so far as it was effective at all was an action by the executor against Webster, and in such cases the limitations of section

1880 of the Code of Civil Procedure do not apply.

In *George v. McManus*, 27 Cal.App. 414, 150 P. 73, the automobiles of George and McManus collided. George sued McManus for damages to his car. Pending the suit McManus died and his personal representatives were substituted as defendants. In addition to their answer denying the allegations of the complaint defendants filed a counter-claim alleging that the collision was caused by the negligence of plaintiff. Upon appeal error was predicated upon the fact that the court permitted plaintiff to testify to matters occurring before the death of McManus. The court there found that matters concerning which defendant testified had not been offered in support of the cross-complaint, as at the time the testimony was received no evidence had been yet introduced in support of the counter-claim. However, the court stated in answer to an attack upon the ruling permitting this testimony (page 75):

"Respondent insists, however, that the statute does not apply to a case where the action is brought by the personal representatives of a deceased person to recover upon facts which occurred prior to the death of the testator, and that, inasmuch as defendants filed a counterclaim asking for affirmative action, such fact rendered the testimony of plaintiff competent. In *Sedgwick v. Sedgwick*, 52 Cal. 336, it is held that, where an action is brought by an executrix upon a demand, not against, but in favor of, the estate, the defendant, though a party to the transaction had with the deceased, is nevertheless a competent witness in his own behalf in defending the action."

Appellant also cites *Jones on Evidence*, volume 5, and various authorities from other states, as *Warten v. Black*, 195 Ala. 93, 70 So. 758; *Spencer v. Potter's Estate*, 85 Vt. 1, 80 A. 821; *Gilfillan v. Gilfillan's Estate*, 90 Vt. 94, 96 A. 704; *Janes v. Felton*, 99 W.Va. 407, 129 S.E. 482; *Marshall v. Campbell*, Tex.Civ.App., 212 S.W. 723; *Wallace v. Wallace*, 101 Kan. 32, 165 P. 838; *Turner's Adm'r v. Ward*, 201 Ky. 295, 256 S.W. 389; *Kauffman v. Logan*, 187 Iowa 670, 174 N.W. 366.

However, these latter authorities from sister states are not of particular assistance as the statutes upon which they are based differ in each instance in some particular from the statutes of California.

In view of the holding in *Sedgwick v. Sedgwick*, 52 Cal. 336, and an analysis of

the statute itself leads us to the conclusion that the court erred in restricting the testimony offered by plaintiff in answer to the facts adduced under the counter-claim, and for that reason a new trial should be granted.

The judgment is reversed, and the cause remanded.

We concur: THOMPSON, J.; PLUMMER, J.



27 Cal.App.2d 52

**GERINI et al. v. PACIFIC EMPLOYERS
INS. CO. et al.**

Civ. 10478.

District Court of Appeal, First District,
Division 1, California.

June 8, 1938.

Hearing Denied by Supreme Court
August 4, 1938.

1. Workmen's compensation $\Leftrightarrow$ 1764

A finding of the Industrial Accident Commission that a deceased minor who was killed while riding in an automobile was an employee of owner of automobile was a "final determination" of the fact of the deceased's employment so as to bar statutory action by deceased's parents against owner of automobile for death of minor child, since the remedy under the compensation act was exclusive; St.1917, p. 834, § 6(b), as amended; Code Civ.Proc. § 376.

[Ed. Note.—For other definitions of "Final Determination," see Words & Phrases.]

2. Fraud $\Leftrightarrow$ 16

Where plaintiffs' minor son was killed while riding as guest in automobile, host voluntarily advised plaintiffs as to necessary procedure in recovering from host's insurer, and host promised to represent plaintiffs, and instituted proceeding before Industrial Accident Commission, wherein host stated that son was an employee of host, host's concealment of true facts as to alleged employment was a fraud upon plaintiffs.

3. Fraud $\Leftrightarrow$ 30

A conspiracy between automobile host and his insurer whereby they instituted proceedings under Workmen's Compensation

Act on behalf of parents of minor guest who was killed in automobile accident so as to bar recovery under statute giving parents right of action for death of minor child would render the insurer jointly liable for the fraud. St.1917, p. 834, § 6(b), as amended; Code Civ.Proc. § 376.

4. Fraud ⇨25

Fraud without damage is not actionable.

5. Workmen's compensation ⇨1764

The parents of a deceased minor could not maintain action against host, in whose automobile minor was riding when killed, and host's insurer to recover for alleged fraudulent conspiracy between host and insurer in instituting proceeding under compensation act and obtaining award for death of minor as an employee of host which barred parents' action under statute, for death of child, as long as Industrial Accident Board's finding remained in force, since parents' action would require a relitigation of employment issue, thereby constituting a collateral attack on finding of the board. St.1917, p. 834, § 6(b), as amended; Code Civ. Proc. § 376.

6. Judgment ⇨480

A collateral attack on a final judgment is not permitted.

7. Judgment ⇨522

An action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury cannot be maintained while the judgment remains in force, since the action would constitute a collateral attack on the judgment.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Two separate actions by Eugenio Gerini and Virginia Gerini against the Pacific Employers Insurance Company and others to recover damages allegedly suffered as the result of a fraudulent conspiracy among the defendants. From judgments entered in favor of defendants upon demurrers to the complaints, plaintiffs appeal.

Affirmed.

Fletcher A. Cutler, of San Francisco, for appellants.

Bronson, Bronson & McKinnon, of San Francisco, for respondent Pacific Employers Ins. Co.

GRAY, Justice pro tem.

Plaintiffs took separate appeals from two judgments entered in the above-entitled cause in favor of the defendants, Pacific Employers Insurance Company and Adriano Ramazzotti, after demurrers to the second amended complaint had been sustained without leave to amend.

The action was for the recovery of damages plaintiffs claimed to have suffered as the result of an alleged fraudulent conspiracy between the defendants. The appeals are presented on separate records, but involve the same question; and therefore both appeals may be disposed of in one opinion. The question is: Does the complaint state a cause of action? The following are the material facts alleged therein: Plaintiffs' minor son, while riding in an automobile owned and operated by Ramazzotti, received fatal injuries by reason of the latter's negligence. Ramazzotti was insured against liability for personal injuries caused by his operation of his automobile. Defendants unlawfully and maliciously conspired to defraud plaintiffs by preventing them from commencing in the superior court an action to recover damages for the wrongful death of their son, as authorized by section 376 of the Code of Civil Procedure. Plaintiffs and Ramazzotti were Italians and intimate friends of long standing; and plaintiffs were unable to read, speak or understand the English language, while Ramazzotti was experienced in business and legal matters, of which they were ignorant. Plaintiffs were accustomed to consult him on their private affairs and to rely upon his advice. Upon their son's death he informed them that he was insured; that in order for them to collect thereon it would be necessary to take proceedings before the industrial accident commission and that the defendants would represent and protect them therein. In furtherance of the conspiracy, defendants filed with the commission an application for adjustment of compensation for the son's death, in which they, with knowledge of its falsity, represented that he, when injured, was Ramazzotti's employee, and induced plaintiffs, by answer, to submit their claim to the commission, and withheld and concealed from the commission evidence establishing that the son was not so employed. As a result of the conspiracy, the commission found that the son was Ramazzotti's employee and awarded plaintiffs the expenses of his burial. This award pre-

vented them from suing Ramazzotti in the superior court.

[1-3] If their son was Ramazzotti's employee, plaintiffs were not entitled to damages under section 376 of the Code of Civil Procedure, since the Workmen's Compensation Act, by its express terms, provided their exclusive remedy. *St.1917*, p. 834, § 6(b), as amended. *Treat v. Los Angeles, etc., Corp.*, 82 Cal.App. 610, 256 P. 447. The commission's finding was a final and conclusive determination of the fact of the son's employment. *Williams v. Southern Pacific Co.*, 54 Cal.App. 571, 202 P. 356. Such finding, therefore, barred plaintiffs from a recovery of damages under said section 376. When the defendant Ramazzotti voluntarily advised the plaintiffs as to the procedure necessary for them to follow in order to collect on the insurance and promised to represent and protect them before the commission, the law imposed upon him the positive duty of fully and fairly divulging all information in his possession which would show the true relationship between the son and himself. His concealment of the facts as to such relationship was a fraud upon plaintiffs. *Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203, 30 P.2d 39. The allegation of a conspiracy between the defendants connects the Pacific Employers Insurance Company with the fraud of Ramazzotti and makes it jointly liable therefor. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943.

[4-7] Plaintiffs argue that defendants' fraud in procuring the commission's finding of employment, by which they were prevented from commencing in the superior court an action for damages under said section 376, gave rise to a new cause of action in their favor. Since fraud, without damage, is not actionable, plaintiffs, as an essential part of their case, would be required to prove that they had a right to damages under such section of which the finding deprived them. 12 Cal.Jur., p. 813. But, as above pointed out, if their son was Ramazzotti's employee when injured, they

never possessed such right. Therefore plaintiffs would be forced to relitigate in this action the issue of his employment, in order to prove the falsity of the finding. To do so constitutes a collateral attack on the finding, which the law does not permit. *Giffen v. Christ's Church*, 48 Cal.App. 151, 191 P. 718. For this reason, an action at law for damages against an adversary party for allegedly procuring a judgment by fraud or perjury cannot be maintained while such judgment remains in force. *Catlett v. Chestnut*, 108 Fla. 475, 146 So. 547; *Freeman on Judgments*, 5th ed., vol. 2, p. 1662. Subornation of witnesses to swear falsely against a defendant in a criminal prosecution does not constitute a cause of action by him for damages. *Taylor v. Bidwell*, 65 Cal. 489, 4 P. 491. Allegations that defendant procured a patent to land by means of perjured testimony and intimidation of witnesses fails to state a cause of action for a declaration of trust. *Cragie v. Roberts*, 6 Cal.App. 309, 92 P. 97. Complaints proceeding upon the same theory as the present one and containing similar allegations have each been held to involve a collateral attack upon a judgment and therefore not to state a cause of action. *Morris v. Travelers' Ins. Co., C.C.*, 189 F. 211; *Hall v. Hall*, 91 Conn. 514, 100 A. 441; *Shultz v. Shultz*, 136 Ind. 323, 36 N. E. 126, 43 Am.St.Rep. 320; *Purdy v. Winters' Estate*, 79 Or. 614, 156 P. 285; *Smith v. Abbott*, 40 Me. 442; *White v. Merritt*, 7 N.Y. 352, 57 Am.Dec. 527. We conclude, therefore, that under the authorities cited, the trial court properly sustained the demurrers without leave to amend and entered judgments in favor of the defendants.

It is ordered, therefore, that the judgment involved in the present appeal, in favor of the defendant Pacific Employers Insurance Company be and the same is hereby affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

27 Cal.App.2d 767

Eugenio GERINI and Virginia Gerini, Plaintiffs and Appellants, v. PACIFIC EMPLOYERS INSURANCE COMPANY (a Corporation), Andriano Ramazzotti and American Indemnity Company (a Corporation), Defendants and Respondents.

Civ. 10477.

District Court of Appeal, First District,
Division 1, California.

June 8, 1938.

Hearing Denied by Supreme Court
August 4, 1938.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Fletcher A. Cutler, of San Francisco, for appellants.

Carl A. Onkka, of San Francisco, for respondent Andriano Ramazzotti.

GRAY, Justice pro tem.

This is a companion appeal to the one taken in *Gerini v. Pacific Employers Insurance Company et al.*, 80 P.2d 499, wherein an opinion has this day been filed, affirming the judgment. All questions raised in the present appeal are considered and disposed of in that opinion. Therefore, upon the grounds and for the reasons stated therein, the judgment herein in favor of the defendant Andriano Ramazzotti is likewise affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



26 Cal.App.2d 751

IRVING v. SHEETZ et al.

Civ. 11792.

District Court of Appeal, Second District,
Division 1, California.

June 6, 1938.

1. Appeal and error ⇨348(1)

A statute providing that appeal must be taken within 60 days after entry of judgment or order which it is sought to have reviewed is jurisdictional and mandatory, and service of notice of entry of judgment is not necessary to start the time running

within which appeal may be taken. Code Civ.Proc. § 939.

2. Appeal and error ⇨348(1)

Under statute requiring appeal to be taken within 60 days after entry of judgment, where judgment for defendant was signed May 10 and entered by clerk May 13, no notice of entry was served on plaintiff's attorneys until September 15, notice of intention to move for new trial was served and filed September 18, and plaintiff's notice of appeal was not served or filed until December 17, appeal was dismissed. Code Civ.Proc. § 939.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Proceeding by Mary Irving against John A. Sheetz, Jr., and another, as individuals and/or as copartners doing business as Mission Athletic Club of Santa Barbara. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

Clarence C. Ward and Ross MacLeod, both of Santa Barbara, for appellant.

George H. Moore, of Los Angeles, for respondents.

PER CURIAM.

On June 3, 1938, we entered an order denying the motion to dismiss the appeal in the above entitled cause. Upon reconsideration, we find that the record herein indicates that the judgment in the superior court was signed May 10, 1937, and entered by the clerk thereof on May 13. No notice of entry of judgment was served upon the attorneys for the plaintiff until September 15, 1937. The notice of intention to move for a new trial was served and filed September 18, and plaintiff's notice of appeal was not served or filed until December 17, which was more than seven months after the entry of judgment.

[1] In the cases of *Lawson v. Guild*, 215 Cal. 378, 380, 10 P.2d 459, and *Kraft v. Briggs*, 15 Cal.App.2d 667, 59 P.2d 1044, it is held that section 939 of the Code of Civil Procedure provides that an appeal, to be timely, must be taken within sixty days after the notice of entry of judgment or order which it is sought to have reviewed; that the statute limiting the time within which the appeal may be taken is jurisdictional and mandatory. It is also there held that service of the notice of entry of judgment is not necessary to

start the time running within which an appeal may be taken.

[2] For the foregoing reasons, and upon the authority of the cases aforesaid, it is ordered that the above-mentioned order of June 3 denying the motion to dismiss the appeal be vacated and set aside, and that the appeal from the judgment herein be, and the same is, hereby dismissed.



27 Cal.App.2d 124

AUSTON et al. v. WILSON, Mayor, et al.
Civ. 2208.

District Court of Appeal, Fourth District,
California.

June 15, 1938.

1. Licenses ⇨7(2)

The classification of the business of operating a school of cosmetology or beauty culture as a separate business by a city ordinance imposing a license tax was proper.

2. Municipal corporations ⇨122(2)

Ordinances imposing a license tax on operation of businesses are presumed to be constitutional.

3. Licenses ⇨7(9)

The rule that fees levied for the purpose of regulation under the police power must bear some reasonable relation to the expense of such regulations has no application where the purpose of the fee is to raise revenue.

4. Licenses ⇨3

A legislative body has broad powers to impose license fees for revenue purposes.

5. Licenses ⇨7(1)

Courts may not interfere with ordinance imposing license fee on operation of a business unless a violation of a constitutional or statutory provision clearly appears.

6. Licenses ⇨7(9)

An excise on the performance of an act which the Legislature could not constitutionally prohibit must be reasonable in amount and must not amount to the suppression of any useful or legitimate occupation or the deprivation of any natural and inalienable right.

7. Licenses ⇨3

The power to license for revenue is not a power to prohibit.

8. Licenses ⇨35

Evidence held to justify judgment denying injunction against enforcement of municipal license tax ordinance imposing license fee of \$125 per quarter on person, firm or corporation operating school of cosmetology or beauty culture on ground that license did not place persons operating such schools in unfavorable position as compared to competing beauty shops and that fee was neither prohibitive nor unjustly oppressive.

9. Municipal corporations ⇨63(1)

On appeal from judgment denying injunction against municipal license tax ordinance, court was not concerned with wisdom of ordinance, but only with the power of the legislative body to adopt the ordinance.

10. Appeal and error ⇨920(3)

On appeal from judgment denying injunction against enforcement of municipal license tax ordinance on ground that license fee imposed was not prohibitive or unjustly oppressive, every intendment was in favor of the judgment which would be affirmed in absence of showing of interference with the constitutional rights of the plaintiff.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to enjoin the enforcement of a city license tax ordinance by W. T. Auston and another against George E. Wilson, Mayor of the city of Bakersfield, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

P. Paul Vlautin, Jr., of San Francisco, for appellants.

Walter Osborn, City Atty., R. Y. Burum, Asst. City Atty., J. W. Heard, Jr., and John Shortridge, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

The plaintiffs brought this action to enjoin the enforcement of a license tax ordinance of the city of Bakersfield. This ordinance imposes a license fee of \$125 per quarter upon any person, firm or corporation operating a school of cosmetology or beauty culture in said city. Only two such schools were and are operated in that city,

being those run by the respective plaintiffs herein. After a hearing the court found that the classification of said business was reasonable and proper, that the license fee provided for is fair, just and reasonable, that no irreparable injury would be done to the plaintiffs, and that it is not true that the license thus imposed would compel the plaintiffs to discontinue the operation of their businesses. From the judgment entered this appeal was taken.

[1,2] The appellants contend that this ordinance is arbitrary, unreasonable, exorbitant and oppressive because of its amount, and therefore void. They concede that the classification of this as a separate business is proper, and further concede that such ordinances are presumed to be constitutional and that every intendment is in favor of the findings of the trial court. In support of their contention that this license fee is unreasonable and oppressive they point out evidence in the record showing that a much smaller fee was imposed by this ordinance upon some seventeen other kinds of business, that a smaller fee is charged for the privilege of operating schools of cosmetology in some eight other cities in this state, and that one of these schools made a net profit of about \$2,400 and \$1,900, respectively, in the two years next preceding the imposition of this license, and the other made a net profit of about \$600 and about \$1,800 in the same years.

The appellants rely on certain cases from other jurisdictions, including *Bryan v. City of Malvern*, 122 Ark. 379, 183 S.W. 957; *Hirshfield v. Dallas*, 29 Tex.App. 242, 15 S.W. 124, and *City of Mankato v. Fowler*, 32 Minn. 364, 20 N.W. 361, in which license fees of \$600, \$500 and \$300 per annum, respectively, were held illegal and void. In the first and third of these cases the decision was based upon the fact that the legislative body was only authorized to impose licenses for the purpose of regulation under the police power and that it did not appear that any such amount was needed for that purpose. In the second of these cases it was held that the evidence was sufficient to show that the fee imposed would have the effect of prohibiting the business.

[3-7] It is neither alleged nor found that this license was regulatory in nature rather than one for revenue and no claim is made that this city was not authorized to raise revenue in this manner. While fees levied for the purpose of regulation under

the police power must bear some reasonable relation to the expense of such regulation this rule has no application where the purpose is to raise revenue. *Los Angeles v. Los Angeles, etc., Co.*, 152 Cal. 765, 93 P. 1006. A legislative body has broad powers along these lines and it is well settled that the courts may not interfere unless a violation of constitutional or statutory provisions clearly appears. The general question here presented is whether it so clearly appears that the imposition of this license fee is prohibitive or unduly oppressive that the findings of the trial court may be set aside. The general rule is thus stated in *Ruling Case Law*, Vol. 26, p. 238: "In most of the states, however, it is regarded as the law that an excise upon the performance of an act which the legislature could not constitutionally prohibit must be reasonable in amount, and must not amount to the suppression of any useful or legitimate occupation or the deprivation of any natural and inalienable right." Even where the power to license for revenue exists this is not a power to prohibit. In *re Dees*, 50 Cal.App. 11, 194 P. 717; *Merced County v. Fleming*, 111 Cal. 46, 43 P. 392. In *Ex parte Haskell*, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527, the court said:

"It is urged, in effect, that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. But we are unable to regard it as open to either or any of these objections. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power, and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs,—within the law, of course,—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof."

In *Vaughan v. City of Richmond*, 165 Va. 145, 181 S.E. 372, it is said (page 374):

"The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal

protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations.'"

In *E. A. Hoffman Candy Co. v. Newport Beach*, 120 Cal.App. 525, 8 P.2d 235, this court said (page 237):

"While the license ordinance may not discriminate in the burden of the charge placed upon those exercising the same privileges in the same manner within the same jurisdiction, the governing body of a municipality may classify business carried on within its limits and impose a license charge upon all those naturally falling within such class different in amount from that charged those within all other classes, fixing the different charges upon the separate classes by any standard or rule which is fair and reasonable and not confiscatory."

In *Cooley on Taxation*, 4 Ed. Vol. 4, p. 3433, the author says:

"Whether a license-tax is prohibitory is primarily a legislative question. All presumptions and intendments are in favor of the validity of the tax; * * * in other words, the mere amount of the tax does not prove its invalidity. * * * The amount of the tax is not to be measured by the profits of the business taxed, and the mere fact that the particular person taxed conducted his business at a loss does not of itself make a tax unreasonable."

In *Pacific Rys. Adv. Co. v. Conrad*, 168 Cal. 91, 141 P. 916, a license fee of \$100 per annum had been imposed upon the business of displaying advertisements in street cars and steam cars carrying passengers. This was four times the amount of the license fee imposed upon newspapers which carried similar advertisements and no license was required of those carrying on the business of displaying advertisements on billboards. There was evidence that the plaintiff in that action had theretofore carried on the business of displaying advertisements in street cars and other conveyances at a loss. In passing upon the question presented, as to whether this ordinance was so unjust, oppressive and discriminatory as to be illegal and void, the court said (page 917):

"The ordinance is clearly a revenue measure within the power of the municipality

to pass. The limitations upon the exercise of this power are familiar ones, that a legitimate business such as this shall not be subjected to oppressive or unjustly discriminatory burdens. Within that limit there is full play for municipal discretion. [Citing cases.] It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a court may be invoked to right the wrong. Manifestly there is, and must be, a broad zone dividing and delimiting, upon the one hand, those ordinances which are clearly reasonable and just from those which are as clearly unreasonable and unjust. In all that broad zone legislative discretion operates. It is doubtful territory. Ordinances falling within it cannot be set aside by the courts, for then there is a clear substitution of the judgment of the courts for the judgment of the Legislature and thus plain judicial legislation. It would add nothing to this consideration to analyze and discuss the many cases presented for consideration by opposing counsel. The result of the consideration, however, may be declared in this: That the ordinance in question falls within the indicated zone where the view of a court may not be substituted for the determination of the Legislature."

[8-10] In effect, the trial court found that the ordinance did not subject this particular line of business to oppressive or unjustly discriminatory burdens and was not prohibitive. It is admitted that the classification is proper and all within that class are treated alike. It does not appear that the operation of the business conducted by the respective appellants will be prohibited. There is no evidence as to the amount of capital invested by either appellant. The evidence as to the expense involved in operating these businesses includes not only salaries for those actually doing the work but salaries for the owners who live in other cities and spend but little time in Bakersfield. If the investment is small a considerable profit is shown when these salaries are considered. It appears that students in these schools work on customers who come for that line of work and that a charge is made for the work done by these students. Apparently this charge is lower than the charge for similar work done by the regular beauty shops in that city and it appears that these students pay considerable amounts by way of tuition and for the privilege of working on these customers. It thus appears that these schools possess a

considerable advantage over the ordinary beauty shop with respect to the cost of doing the work in taking care of customers. While the evidence is vague and incomplete, it cannot be said from the record that the trial court was not justified in holding that the imposition of this license fee did not place these appellants in an unfavorable position as compared to the beauty shops with which they were in fact competing. It may well be, in so far as the record shows, that even with this license these beauty schools are still in a more favorable position than their competitors. The trial court has in effect found that the license fee thus imposed is neither prohibitive nor unjustly oppressive as to these businesses and it cannot be said that this finding is without support in the evidence. We are not here concerned with the wisdom of this ordinance but with the power of the legislative body to adopt the same. A certain discretion rested in the city council, a question of fact was thereafter presented to the trial court, every intendment is in favor of the judgment rendered, and upon the record before us it cannot be said that it clearly appears that the constitutional rights of the appellants have been interfered with.

The judgment is affirmed.

I concur: MARKS, J.



26 Cal.App.2d 725

PEOPLE v. YANT et al.

Cr. 3096.

District Court of Appeal, Second District,
Division 1, California.

June 3, 1938.

1. Conspiracy ⚡43(1)

An indictment charging conspiracy to violate the Corporate Securities Act and to commit grand theft was not invalid because lacking allegation of value of stolen property or of facts constituting grand theft, since conspiracy to violate Securities Act constituted an offense and details were given by transcript of testimony upon which indictment was founded. Pen.Code, §§ 182, 870, 925, 952; St.1917, p. 673.

2. Conspiracy ⚡43(1)

Under statute defining conspiracy, indictment may charge conspiracy to commit any or all of the illegal acts included in definition. Pen.Code, § 182.

3. Indictment and Information ⚡125(5½)

Conspiracy to do all the things enumerated in statutory definition of conspiracy amounts to a single offense only. Pen.Code, § 182.

4. Indictment and Information ⚡59

The purpose of an indictment or information is to inform accused of the charge which he must meet at trial, details of which are furnished by transcript of testimony upon which indictment was founded. Pen.Code, §§ 870, 925, 952.

5. Criminal law ⚡1032(5)

Objection to indictment is waived by failure to demur upon statutory grounds, and cannot be presented for the first time on appeal. Pen.Code, § 1004.

6. Conspiracy ⚡51

The sentence of a defendant convicted of conspiracy to violate Corporate Securities Act and to commit grand larceny was not illegal because of difference in maximum length of imprisonment authorized for the substantive offenses, since conspiracy itself is the crime, and determination of period of imprisonment is a question for board of prison terms and paroles. St.1917, p. 673; Pen.Code, § 182.

7. Criminal law ⚡878(3)

Acquittal on counts charging substantive offenses of grand theft did not operate to acquit defendant of other counts charging conspiracy to commit grand theft and to violate Corporate Securities Act, since other overt acts than grand theft were sufficient to constitute conspiracy, though some of them were not criminal in themselves. St. 1917, p. 673; Pen.Code, § 182.

8. Criminal law ⚡878(3)

Acquittal of a substantive offense operates as acquittal of conspiracy charge in same indictment, only where substantive offense is alleged as a single entity to be the only overt act in furtherance of conspiracy. Pen.Code, § 182.

9. Conspiracy ⚡27

Innocent acts done and performed in preparation to carry out criminal conspiracy are sufficient "overt acts" to constitute conspiracy. Pen.Code, § 182.

10. Conspiracy $\hookrightarrow$ 47

Evidence of defendant's participation in scheme for selling acreage interests in oil and gas land held to authorize conviction of conspiracy to violate Corporate Securities Act and to commit grand theft. Pen.Code, § 182; St.1917, p. 673.

11. Licenses $\hookrightarrow$ 18½

Grant deeds sold by oil company to customers for small parcels of oil land, in connection with which company agreed to pay guaranteed minimum rental for community lease from customers, with intent that customers should receive pro rata share in any oil production, were "securities" within Corporate Securities Act. Pen.Code, § 182; St. 1917, p. 673.

12. Criminal law $\hookrightarrow$ 26

The substance and not the mere form of transactions is the proper test of their real character, in order to prevent circumvention of statutes framed for the protection of the public.

13. Conspiracy $\hookrightarrow$ 47

Generally, mere association is not sufficient to show conspiracy. Pen.Code, § 182.

14. Conspiracy $\hookrightarrow$ 47, 48

Conspiracy may be proved by circumstantial evidence, weight and sufficiency of which is for jury. Pen.Code, § 182.

15. Criminal law $\hookrightarrow$ 1160

Before reviewing court can set aside decision or jury verdict which has been approved by trial judge in denying motion for new trial, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the verdict and the trial court's conclusion.

16. Criminal law $\hookrightarrow$ 423(1)

In prosecution for conspiracy, testimony that witness related to defendant certain statements made to witness by a coconspirator, who had not been apprehended, was admissible.

17. Criminal law $\hookrightarrow$ 656(3), 1186(4)

A statement made to jury by court in conspiracy prosecution, when testimony of coconspirators before grand jury was offered as evidence, that "after proof of a conspiracy the acts and declarations of a conspirator against his coconspirators relating to the conspiracy may be received into evidence," was error, but not reversible where court subsequently instructed jury that such testimony could not be considered as against

other conspirators, and evidence fairly authorized conviction. Pen.Code, § 182; Const. art. 6, § 4½.

18. Constitutional law $\hookrightarrow$ 87
Licenses $\hookrightarrow$ 7(1)

The Corporate Securities Act requiring license to sell certain securities is not unconstitutional as interfering with right to acquire, possess, and dispose of property. St.1917, p. 673; Const.Cal. art. 1, § 1; U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Milfred R. Yant was convicted, in a joint prosecution with others, of conspiracy to violate the Corporate Securities Act and to commit grand theft, and of violating the Corporate Securities Act, and he appeals.

Affirmed.

Eugene L. Wolver and David Coleman, both of Los Angeles (Louis Miller, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Herman L. Arterberry, A. H. Van Cott, and Jere J. Sullivan, Deputy Dist. Attys., all of Los Angeles, for the People.

WHITE, Justice.

In an indictment returned by the grand jury, appellant, Milfred R. Yant, and the above-named codefendants were charged in count I, with the crime of conspiracy to violate the Corporate Securities Act (St. 1917, p. 673), and to commit grand theft. In eleven of the remaining twenty counts they were charged with the substantive offenses of grand theft, and in nine counts with as many violations of the Corporate Securities Act. Appellant admitted that he had suffered a prior felony conviction as charged against him. Defendant William Burns was not apprehended. Upon the entry of not guilty pleas by the remaining defendants as to all counts of the indictment, the cause proceeded to trial before a jury, during the progress of which trial defendant Jack Freeman withdrew his plea of not guilty as to count III, whereupon as to him the remaining counts of the indictment were dismissed. Upon the completion of the People's case, the defense offered no testimony and rested. The jury returned verdicts finding appellant Yant guilty on

count I, charging conspiracy to violate the Corporate Securities Act and to commit grand theft, guilty on the nine counts of the indictment charging violations of the Corporate Securities Act, and not guilty as to the counts charging grand theft. A codefendant, Earl A. Libby, was likewise convicted and acquitted on the same counts as appellant Yant. Defendant Libby was placed on probation and does not appeal. From the several judgments pronounced against him and from the order denying his motion for a new trial, defendant Yant prosecutes this appeal.

[1-4] The first contention advanced by appellant is that the wording of the indictment as to count I is wholly insufficient to charge any offense other than the conspiracy to violate the Corporate Securities Act, for the reason that as to the charge of conspiracy to commit the crime of grand theft, the pleading is destitute of any allegation as to the value of the property alleged to have been the subject of the proposed theft or the narration of any acts which would constitute grand theft. Appellant's claim in this regard cannot be sustained, for the law is well settled that under the provisions of section 182 of the Penal Code an unlawful agreement to commit more than one crime may be alleged. The language of section 182 of the Penal Code here in question is inclusive and elastic enough to permit the framing of an indictment charging conspiracy to do or commit any or all of the illegal acts referred to therein (*People v. MacPhee*, 26 Cal.App. 218, 220, 146 P. 522); and to do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only. *People v. Johnson*, 22 Cal.App. 362, 364, 134 P. 339; *People v. Welch*, 89 Cal. App. 18, 264 P. 324; *People v. Gilbert*, Cal. App., 78 P.2d 770. As to the uncertainty charged with reference to the grand theft allegations, the answer is that the purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. Under our system of procedure in criminal cases, as a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be. Secs. 870, 925, Pen.Code. The former requirement that a pleading must set forth the particular circumstances of the offense charged, as now amended declares that it shall be

sufficient if it charges "in any words sufficient to give the accused notice of the offense of which he is accused". Sec. 952, Pen.Code. The appellant herein was entitled simply to notice of the offense of which he was charged, but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment was founded. *People v. Beesly*, 119 Cal. App. 82, 6 P.2d 114, 970; *People v. Gilbert*, supra; sec. 951, Pen.Code. A mere reading of the issues presented in the case of *People v. Barnard*, 63 Cal.App. 562, 571, 219 P. 756, cited by appellant, readily indicates that it is easily distinguishable from the instant case. In the conspiracy charge it was of course required, and the indictment did allege certain overt acts.

[5] Concerning the alleged uncertainty in the indictment, it might here be noted that no demurrer was interposed in this case. We have, however, given consideration to the claim, made for the first time in this court, notwithstanding that when a party accused fails to demur upon any of the grounds mentioned in section 1004 of the Penal Code, the objection is to be deemed waived and cannot be presented for the first time on appeal. *People v. McKim*, 84 Cal.App. 663, 258 P. 457.

[6] Appellant next complains that he was not legally or properly sentenced for the offense charged in count I, for the reason that the offense of conspiracy to violate the Corporate Securities Act is punishable by a term of imprisonment not exceeding five years, while the maximum penalty for the crime of conspiracy to commit the offense of grand theft is ten years. This claim is without merit, because the conspiracy, that is, the unlawful agreement or combination, is the crime; and that is one, however diverse its objects. As to the difficulty which appellant asserts may arise in determining the period of imprisonment that may be fixed as punishment for the crime, that is a question for the board of prison terms and paroles to determine, and not the trial court. Both the offenses charged as being the object of the conspiracy are felonies, and the trial court having designated a state prison as the place of confinement, the question of determining the extent of the sentence is left with the aforesaid prison board. As was said in the case of *People v. Welch*, supra, page 24, 264 P. page 326, "it is quite possible that the query will never become acute,

for the reason that the prison board may see fit to fix a period of incarceration within the maximum provided for the least serious offense specified as the object of conspiracy, in which event appellants would have no legal cause for complaint."

[7-9] The acquittal of appellant on the eleven counts charging him with the substantive offenses of grand theft, and which counts were also pleaded as overt acts in count I charging conspiracy, did not operate to acquit him of the conspiracy count, because the substantive offenses charged did not constitute the only overt acts pleaded in the conspiracy count; and therefore the innocence of appellant of the substantive offenses of grand theft did not constitute a determination that no criminal conspiracy existed. It is only when the substantive offense charged is alleged as a single entity to be the only overt act in furtherance of the conspiracy that an acquittal of the substantive offense operates as an acquittal of the conspiracy charge based solely thereon. Where, as in the instant case, the portion of the count charging conspiracy remaining unadjudicated is sufficient to constitute criminal conspiracy, a conviction on the latter charge will stand (In re Johnston, 3 Cal.2d 32, 35, 43 P.2d 541); and this is true although some of the overt acts charged in the conspiracy count were not in themselves of a criminal nature, because if such innocent acts were done and performed in preparation to carry out the conspiracy, they are sufficient overt acts within the meaning of the law of this state. *People v. George*, 74 Cal. App. 440, 451, 458, 241 P. 97; *People v. Stevens*, 78 Cal.App. 395, 405, 248 P. 696; *People v. Gilbert*, supra.

[10] Appellant next contends that as to all counts upon which he was convicted, the evidence is insufficient to justify or sustain said convictions. For a proper consideration of this claim it is necessary to present a statement of the factual background of the activities of appellant and his associates, as the same was developed by the evidence produced at the trial. On April 27, 1935, the appellant entered into a ninety-day sublease agreement with the Nile Oil Company, Ltd., a corporation, covering certain oil lands near Newhall, California, on which there were four wells. On April 30, 1935, the appellant Yant and his codefendants Earl A. Libby and Aubrey Pereira organized a corporation under the laws of California, the purpose of which,

among other things, was to engage in the oil, petroleum, mineral and gas business under the corporate name of Yant Petroleum Corporation, and filed articles of incorporation with the secretary of state on May 1, 1935. The corporation commissioner issued a permit to the corporation to sell not to exceed 1000 shares of its stock for cash to its officers, appellant Yant, and codefendants Libby and Pereira, who were respectively president, secretary-treasurer and vice-president. There is no evidence that authority was given to sell to the public or that any sales of stock were made to the public, from which it necessarily follows that the Yant Petroleum Corporation was what is commonly known as a "closed corporation".

On May 20, 1935, appellant Yant entered into another oil and gas sublease with the Nile Oil Company, Ltd., covering the aforesaid and additional lands, with added obligations in said sublease set forth. On July 24, 1935, the appellant Yant assigned and transferred this sublease to the Yant Petroleum Corporation. On September 1, 1935, another and additional agreement was entered into between the Nile Oil Company, Ltd., and the Yant Petroleum Corporation, whereby it was agreed that the latter would purchase the original oil and gas lease mentioned and described in the above-named subleases. It further appears that appellant Yant entered into an option to purchase certain real properties from Thomas F. Frew, Jr., and wife on June 15, 1935, covering approximately 300 acres of land near Newhall at the stipulated price of \$50 per acre, and on February 15, 1936, appellant entered into an option to purchase an additional small tract of land near Newhall from Thomas F. Frew, Jr., and Walter Park, at the agreed price of \$1,000 for each and every 1/12th acre. On July 8, 1936, a novation, disclaimer, release and waiver was entered into between Mr. and Mrs. Frew and appellant, wherein the Frews released all right, title and interest to the oil and gas rights on the above-described land to appellant.

With reference to the subsequent activities and negotiations carried on by appellant, it will not be necessary to set forth the testimony of each of the witnesses with reference to the individual counts, because the testimony of the witness Dr. H. B. Bryson with reference to his contact and business relations with appellant will serve to illustrate the conduct and activities of

appellant. Epitomized, such testimony indicates that on December 13, 1935, Dr. Bryson, who was 79 years of age, met the defendants Martin and Pereira, who took him and a Mrs. Emma K. Lemley out to the property at Newhall, where he was introduced by defendant Martin to the appellant. At this time the doctor had a conversation with appellant Yant, who informed him that appellant owned 417 acres and had options on additional acreage, and was selling this property at \$1,950 per acre, but that he would sell any part of an acre in small fractions pro rata. Appellant also stated that there were four wells now producing there, and that from these wells appellant paid interest on his community leases, which leases will be later referred to. At this time Dr. Bryson took an option to purchase one acre, and signed an order for a deed in the presence of appellant, whereupon appellant directed defendant Martin, who was one of his salesmen, to prepare the option and order. On January 10, 1936, Dr. Bryson, went to the office of appellant, where he met the defendant Libby, who was one of the officers of Yant Petroleum Corporation, and Dr. Bryson paid to defendant Libby the sum of \$505, receiving a receipt from Libby therefor, and also obtaining from defendant Libby a grant deed executed by appellant Yant conveying one acre of land. Dr. Bryson thereupon executed a community oil and gas lease of said land to the Yant Petroleum Corporation. In this connection, it might here be noted that the evidence indicates in all of the counts that the purchasers of land interests were advised of the oil possibilities and were requested to and did execute community leases. On February 10, 1936, Dr. Bryson again purchased another one-half acre of land, following a conversation with appellant and defendant Martin, at which time appellant stated that he had a very choice half acre very close to the producing wells and the well he was then drilling, and pointed out the location of this very choice half acre. Dr. Bryson paid \$300 down on this half acre, and the balance was to be paid at the rate of \$50 per month. A deed executed by appellant for this half acre was delivered to the doctor, who thereupon executed a community oil and gas lease of the land in question to the Yant Petroleum Corporation. On July 18, 1936, Dr. Bryson purchased another half acre from the appellant adjoining the above half acre, for which he received a grant deed executed

by appellant and upon which land the doctor again executed an oil and gas lease.

Shortly thereafter, Dr. Bryson was called upon by a man named Burns (who was named as a defendant in this action, but who was never apprehended), with whom the doctor had a conversation. Following this conversation, the doctor contacted appellant and defendant Libby at their office in Los Angeles, telling them that Burns had stated to him that he represented the Consolidated Oil Royalties Company of Oklahoma, and was authorized by his company to purchase thirty acres of the Yant Petroleum Corporation's holdings at \$5,000 per acre; and that Burns said he obtained Dr. Bryson's name from a former employee of Yant Petroleum Corporation. Following this conversation wherein Dr. Bryson told Yant and Libby of his conversation with Burns, the doctor purchased an additional three acres from appellant, giving to the latter in payment for this acreage certain oil bonds aggregating \$5,000 and a promissory note in the sum of \$1,950. Following the receipt of a deed to this last-named property, executed by Yant, the doctor in turn gave an oil and gas lease on the land to Yant Petroleum Corporation. It might here be noted that Burns never again appeared.

On August 8, 1936, appellant Yant sent a form letter to all land purchasers, advising them that he had withdrawn his property from the market because well No. 5 had "blown in" and the property was too valuable to sell to any one; and in this letter appellant also advised the addressees that he had dismissed all of his salesmen. A few months later, on November 6, 1936, defendant Libby sent a form letter to all purchasers, signed by him as secretary-treasurer of the Yant Petroleum Corporation, advising them that well No. 5 had been completed, was then in production, and that the corporation was drilling well No. 6.

The oil and gas leases executed by Dr. Bryson and others mentioned in the respective counts to the Yant Petroleum Corporation, among other things provided for monthly rentals to be paid to the landowners in the sum of \$16.20 per acre or fraction thereof, and also monthly payments of a specified fraction of the net proceeds of the sale of oil by the lessee. These rentals were paid by Yant Petroleum Corporation until September, 1936, when they ceased. On the back of the "order for deed" which formed a part of each transac-

tion, there was printed a report of the real estate commissioner of California, containing among other things, this language: "The subdivider informs this Division that the Yant Petroleum Corporation will lease these lots from the purchaser for a period of twenty years, paying them a guaranteed minimum rental of \$19.50 per year per lot." The deeds which passed from appellant to the various grantees mentioned in the counts upon which appellant was convicted convey parcels of land varying from a 7/1000ths part of an acre to one acre.

[11,12] In view of the recent decisions in the cases of *People v. Jackson*, Cal.App., 74 P.2d 1085, and *People v. Daniels*, Cal. App., 76 P.2d 556, it would extend this opinion to undue length were we to discuss in detail the claim here made that the various instruments executed by appellant and introduced in evidence as aforesaid were deeds whereby interests in real property were transferred, and that they do not come within the definition of a "security" as that term is defined in the California Corporate Securities Act, and that appellant therefore could not be successfully prosecuted for issuing the same. It is evident from the foregoing testimony that the intent and purpose of both appellant as grantor and the grantee in each instrument was to sell and purchase an interest in oil that might be produced upon the land, for representations were made that the land would be leased by the Yant Petroleum Corporation for a stated monthly rental and that the purchaser, who became lessor in the community lease, would receive a pro rata share in any oil production. In other words, it was never intended in the transactions here in question that the purchasers of the land would receive any returns from their money on account of anything done by them, but on the contrary, the only returns to the investors would be on account of something done by others, to-wit, the lessees under the community leases; and we are constrained to the opinion that the transactions constituting the respective counts wherein appellant was convicted of conspiracy to violate, and of violations of, the Corporate Securities Act, come within the scope of the statute. *People v. Steele*, 2 Cal.App.2d 370, 374, 36 P.2d 40. Looking through the mere form of the instruments to the facts and circumstances which surrounded their execution, we have no hesitancy in arriving at this conclusion. It should be and is an established principle

of law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true, it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit. *People v. Ratliff*, 131 Cal.App. 763, 772, 22 P.2d 245; *People v. Reese*, 136 Cal.App. 657, 672, 29 P.2d 450. The evidence clearly shows that appellant and his codefendants were engaged in the business of selling securities in the form of certificates of interest in an oil title and lease, without first having applied for and secured from the commissioner of corporations of this state a permit authorizing them so to do.

[13-15] Concerning the conspiracy count, numbered I in the indictment, and appellant's claim that there is no evidence in the record of any agreement between appellant and the coconspirator Libby, who was also convicted, that shows the formation of a conspiracy, we concede the soundness of appellant's claim, as a principle of law, that mere association is not sufficient to show a conspiracy. However, in the case before us there was more than mere association; on the contrary, there was considerable active cooperation between appellant and his codefendant Libby. For instance both were incorporators of the Yant Petroleum Corporation; in connection with their dealings with Dr. Bryson both appellant and Libby occupied the same offices; Dr. Bryson paid both appellant and Libby various sums of money in connection with the transactions mentioned in the conspiracy count, and received receipts from each of them at various times; while the doctor also had several conversations with appellant and Libby pertaining to the property sold to him. The evidence necessary to prove a conspiracy may, and in many instances invariably must, be established by circumstantial evidence. It is not often that the direct fact of an unlawful agreement which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts bearing upon the common design; and the question as to the existence of the conspiracy being one of fact, it is sufficient if the circumstances proved satisfy the jury, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. *People v. Sampsell*, 104 Cal.App. 431, 439, 286 P. 434. It requires no citation of authority for the statement

that before this court on appeal can set aside the decision or the verdict of the jury, which has been approved by the trial judge in the denial of a motion for a new trial, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the verdict of the jury and the conclusion of the trial court. None of the evidence introduced by the prosecution was in any wise contradicted by appellant or his codefendants. Appellant did not take the stand to deny any of the accusatory evidence submitted by the prosecution.

[16] Appellant next contends that the trial court fell into error in admitting certain evidence as to the codefendant Burns, who was not upon trial because he had not been apprehended. Burns, it will be remembered, is the man who appeared with an offer to buy the land from the purchasers thereof, with the proviso, however, that they would have to obtain more land than they then owned, for which Burns would pay a price that would net such purchasers a large profit. Reference to the record indicates that the trial court did not permit the witnesses to testify as to their conversations with Burns, but did permit them to testify as to what they said to appellant concerning their conversations with Burns. As an example of the type of testimony which was admitted, we might refer to the witness Viola Coates, who testified that after Burns left she went to the office of appellant, telling him that Burns had called and said he represented an Oklahoma oil company, and that he offered \$10,000 for two acres; that she asked appellant if he knew Burns, and the former said he did. She then informed appellant that she told Burns she did not have two acres, to which appellant replied, "I had you on our records for two acres". She later went back to see appellant, telling him she had been tricked and fooled into buying this additional property, and demanding her money back; appellant did not deny this last statement, but said he would return her money, which he never did. Thus we see that the testimony admitted was not as to conversations had with Burns outside the presence of defendants, but consisted of statements made by Burns, who was a conspirator, to the witness and which were related by the latter to the conspirator and appellant Yant. This was proper.

[17] It is next contended by appellant that the court erred in permitting the de-

puty district attorney over objections of defendants to read to the jury the testimony of the coconspirators Tabor and Pereira given before the grand jury without advising the jury that such testimony, having been given subsequent to the termination or frustration of the conspiracy, was not binding upon appellant or any of the coconspirators other than the declarants thereof. Following such objections, the court stated to the jury: "Now, in due time the court will give you instructions concerning the method by which you should consider and weigh the evidence in the case. So far as the charge of conspiracy is concerned, the court now instructs you that it is the law that after proof of a conspiracy the acts and declarations of a conspirator against his coconspirators relating to the conspiracy may be received into evidence. I state this to you without any implication from me or inference to be drawn from my statement that the crime of conspiracy has or has not been proved. In due time that problem will be presented to you for your determination under instructions to be subsequently given to you." This was an incorrect and erroneous statement of the law concerning the declarations of coconspirators made after the termination or frustration of the conspiracy. However, at the close of the case, the court gave the following instructions:

"The acts and declarations of one defendant, committed or spoken after the commission of the alleged offense, not in the presence of his codefendants, are not evidence against the defendants not present."

This was followed by the following decisive instruction:

"You are instructed that the testimony of defendants Tabor and Pereira before the grand jury cannot be considered by you as against any other defendant."

In the face of this positive and correct exposition of the law, having in mind section 41½ of article 6 of the Constitution, and after an examination of the entire cause, we cannot say that the error complained of has resulted in a miscarriage of justice. Remembering that neither appellant nor any of his coconspirators testified in their own behalf, and that their failure so to do and thereby explain or deny by their testimony any evidence against them may be considered by the court and jury, we have no hesitancy in saying that the record here does not present a case that is so evenly balanced in the scales of justice

that the error complained of would be prejudicial to appellant. This is especially true in view of the court's final and proper instruction.

Appellant next complains of the refusal of the court to give certain instructions, and sets forth in his reply brief the instructions which he contends the court should have given. No complaint is made of the instructions that were given, but it is contended that certain instructions consonant with the theory of the defense were refused by the court. We have examined the instructions given, as well as those refused. This examination fortifies us in the view that the jury was correctly and properly instructed upon all issues presented by the indictment or raised by the evidence, and that the instructions requested by appellant and refused by the trial court were either erroneous and not justified by the issues or the evidence, or had been covered by other and correct instructions.

[18] Lastly, appellant contends that the Corporate Securities Act is unconstitutional. The cases of *People v. Craven*, 219 Cal. 522, 27 P.2d 906; *Domestic and Foreign Pet. Corp. Ltd. v. Long*, 4 Cal.2d 547, 51 P.2d 73; *People v. Rubens*, 11 Cal.App. 2d 576, 54 P.2d 98, 1107; and *People v. Leach*, 106 Cal.App. 442, 290 P. 131, have all held the Corporate Securities Act to be constitutional in the light of the facts before the court; while we have no hesitancy in saying that under the facts presented in the case before us the act is not unconstitutional. In answer to appellant's criticism of the act to the effect that it interferes with the right to acquire, possess and dispose of property, as guaranteed by article 1, section 1, of the Constitution of this state, and the XIVth Amendment to the Constitution of the United States, we might close this opinion with the following observation by the Supreme Court of the United States relative to the purposes of legislation of this character and of the evils it is designed to correct:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive

measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "blue sky"'; or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550, 37 S. Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643. The defendant was fairly tried and justly convicted.

The judgments and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.



27 Cal.App.2d 99

GREEN v. GREEN.

Civ. 6037.

District Court of Appeal, Third District,
California.

June 10, 1938.

Hearing Denied by Supreme Court
August 8, 1938.

1. Appeal and error ⇐907(3)

Where cause was before District Court of Appeal simply upon the judgment roll, the District Court of Appeal would presume that the testimony supported the trial court's decree.

2. Divorce ⇐252

Under statute providing that community property should be divided equally between divorced parties if the divorce decree was rendered on any other ground than adultery or extreme cruelty, each party takes an equal portion of the community property of as nearly equal value as can be determined and divided by the trial court. Civ.Code, § 146, subd. 2.

3. Divorce 252

A divorced wife to whom was awarded a one-third interest in certain community property was not entitled to an order amending divorce decree so as to give her an undivided one-half interest in certain community property on ground that statute providing that community property should be divided equally between the parties meant that each of the parties must be awarded an undivided one-half interest of every specific particle of community property. Civ.Code, § 146, subd. 2.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Divorce action by Louise M. Green against George W. Green. From an order denying plaintiff's motion for the amendment nunc pro tunc of the divorce decree, the plaintiff appeals.

Order affirmed.

E. T. Young, of Los Angeles, for appellant.

Kenneth W. Kearney, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In 1916, the plaintiff brought an action against the defendant to obtain a decree of divorce on the grounds of wilful desertion, and asking a division of community property. Personal service was had upon the defendant, who failed to answer. Upon the trial of the action a divorce was granted to the plaintiff, and the interlocutory decree and final decree of divorce divided the community property as follows:

"And it is further ordered, adjudged and decreed that an undivided one-third interest in and to the community property of plaintiff and defendant herein, situate, lying and being in the County of Los Angeles, State of California, and more particularly described as follows, to-wit: The south forty-nine and ninety-seven one hundredths (49.97) feet of lot thirteen (13), and the north five hundred and fourteen and eleven one hundredths (514.11) feet of lot fourteen (14) in Tract 1664, in said County of Los Angeles, State of California, as per Map of said tract recorded in Book 22 of Maps, at pages 10 and 11, records of Los Angeles County, in the county recorder's office of said County of Los Angeles, State of California, be, and it

is hereby awarded to plaintiff herein, as and for her sole and separate property."

In 1936 the plaintiff gave notice of, and filed a motion for the amendment nunc pro tunc of the decree just mentioned, to the effect that it would award to the plaintiff a one-half interest instead of an undivided one-third interest in and to certain property described in the decree. The trial court denied the motion, and from the denial of said motion the plaintiff prosecutes this appeal.

[1-3] The appeal is based upon subdivision 2 of section 146 of the Civil Code which provides that if the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be divided equally between the parties.

The contention of the appellant appears to be to the effect that the court, under the subdivision of section 146, supra, must award to each of the parties an undivided one-half interest of every specific parcel of community property. This, however, is not sustained by the authorities in this state passing upon that question. The cause is before us, of course, simply upon the judgment roll, and we must presume that the testimony supported the decree entered by the trial court. The entire current of authority is to the effect that the trial court shall divide the community property equally, which means that each shall take an equal portion of the community property, of as nearly equal value as can be determined and divided by the trial court.

A similar case was before the court in *Thomsen v. Thomsen*, 31 Cal.App. 185, 159 P. 1054. What is said in that case is decisive of the questions here presented. We quote therefrom as follows (page 1056):

"Appellant takes the position that the court must divide the community property in some proportion between the spouses, that the Code so provides, and it has no authority to award all of the 107 acres to the plaintiff, as such act was not a division. In adjusting the property rights of the parties the court may consider all the common property as one asset or fund, composed of separate units, and can often more equitably settle and adjust matters by giving all of designated and described pieces of property to one party than by awarding to each an undivided interest in all. We know of no principle of law or practice that would forbid such a course of action. The court is no more bound

to award to each spouse an undivided interest in each piece of land than it is to award to each an undivided interest in each cow or horse."

To the same effect are the following cases: *Marshall v. Marshall*, 196 Cal. 761, 239 P. 36; *Webster v. Webster*, 216 Cal. 485, 14 P.2d 522.

Other points are discussed in the briefs, but what we have said shows that the appeal is absolutely without any merit.

The order of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



**HAMILTON v. PACIFIC ELECTRIC
RY. CO. ***
Civ. 11789.

District Court of Appeal, Second District,
Division 2, California.

June 16, 1938.

Hearing Granted by Supreme Court
August 15, 1938.

1. Carriers ↪316(1)

In action for injuries sustained when street car passenger stepped in a small pool of oil on the floor of the street car company's station waiting room, the doctrine of *res ipsa loquitur* was inapplicable.

2. Carriers ↪316(1)

In action for injuries sustained when street car passenger stepped in a small pool of oil on the floor of the street car company's station waiting room, the passenger had the burden to show that the oil was on the floor and that the street car company had actual knowledge of its existence or that the oil had been there for so long a time that company was charged with notice of its existence.

3. Carriers ↪318(2)

Evidence that street car passenger who fell and sustained injuries when she stepped in pool of oil on floor of street car company's station waiting room had waited twenty or thirty minutes in the waiting room and had not observed any one passing through the swinging door which was located about one foot from the pool of oil, and that passenger did not know how long

the oil had been on the floor, was insufficient to show street car company had knowledge of the oil's existence, or to show that the oil had been on the floor for so long a time that the company was charged with notice of its existence, which was necessary to sustain a judgment for the passenger.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Jennie E. Hamilton against the Pacific Electric Railway Company for injuries sustained when the plaintiff slipped and fell after stepping in a small pool of oil on the floor of defendant's waiting room in the defendant's station at Los Angeles. From an adverse judgment, the defendant appeals.

Reversed.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellant.

Leo V. Youngworth and J. Harold Decker, by Leo V. Youngworth, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for personal injuries caused by plaintiff's slipping and falling when she stepped in a small pool of oil on the floor of defendant's waiting room in the station at Los Angeles. The contention of the defendant is that there is not any evidence to sustain the finding that the defendant was negligent for the reason that there was no evidence that the defendant had knowledge of the condition or that the condition complained of had existed for so long a time that defendant was charged with notice of its existence.

[1, 2] The doctrine of *res ipsa loquitur* does not apply. The plaintiff has the burden not only to show that the oil was on the floor, but also that the defendant had actual knowledge of its existence or that it had been there for so long a time that the defendant is charged with notice of its existence. *Crawford v. Pacific States, etc., Co.*, Cal.App., 71 P.2d 333; *Gold v. Arizona Realty, etc., Co.*, 12 Cal.App.2d 676, 55 P. 2d 1254; *Touhy v. Owl Drug Co.*, 6 Cal. App.2d 64, 44 P.2d 405.

This court, in granting a reversal in the case of *Gold v. Arizona Realty, etc., Co.*,

*For subsequent opinion see 86 P.2d 829.

supra, said: "The manager of the apartment house testified that the janitors frequently washed the stairway with soap and water. The janitors were not called as witnesses. The record fails to disclose sufficient evidence as a matter of law to charge defendant with responsibility for plaintiff's accident. The doctrine of *res ipsa loquitur* is not applicable to the facts shown in evidence. The mere fact that plaintiff tripped and fell down stairs does not of itself create a situation in which the doctrine can be invoked. *Finch v. Willmott*, 107 Cal.App. 662, 290 P. 660. It was not shown that the 'substance' which caused plaintiff's fall had been on the stairway any length of time or that it had been left there by an agent of defendant."

In the case of *Crawford v. Pacific States, etc., Co.*, supra (page 334), the court quoted with approval the general rule from 45 Corpus Juris 837, section 245: "In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it."

[3] With the law in mind we turn to the evidence. The only evidence regarding the oil is from the plaintiff. The plaintiff testified in substance that on the evening of the day of the accident she got off of one street car and walked into the waiting room to wait for another car to take her home; that at the entrance to the waiting room there were two swinging doors and that she went through the west swinging door and seated herself on a bench in the waiting room for twenty or thirty minutes, and during that time she did not observe any person go in or out of said swinging doors; that when her car arrived she started out of the waiting room through the east swinging door and slipped upon the oil, which caused her to be thrown to the floor and injured. The pool of oil was about fifteen inches wide and was located one foot inside the swinging doors. She testified she did not know how long the oil had been there or who placed it there, and she was the only witness.

There is no other evidence that the defendant had actual knowledge of the oil's existence, or that the oil had been there for so long a time that the defendant was charged with notice of its existence. In our view there is not any substantial evidence to prove either of said issues.

Judgment reversed.

I concur: McCOMB, J.

WOOD, Justice.

I dissent.

It was the duty of the defendant in maintaining a waiting room to exercise reasonable care to be informed of its condition while it was in use by the public. Defendant may be held liable for such defects as a reasonable inspection would have disclosed. *Newell v. K. & D. Jewelry Co.*, 119 Conn. 332, 176 A. 405. It was the function of the trial court to draw inferences from the evidence and to determine if defendant made reasonable inspection. Plaintiff testified that she sat in the waiting room from twenty to thirty minutes and during that time she did not observe anyone enter or leave through the doors. The trial court doubtless concluded that the oil had remained in the doorway long enough to charge defendant with constructive notice of its presence and that defendant had not made reasonable inspection. In my opinion there is substantial evidence to sustain the findings of the trial court. *Williamson v. Hardy*, 47 Cal.App. 377, 190 P. 646; *McClurken v. Ralph's Grocery Co.*, 130 Cal.App. 529, 20 P.2d 66; *Sharpless v. Pantages*, 178 Cal. 122, 172 P. 384.



27 Cal.App.2d 106

**UNION OIL CO. OF CALIFORNIA v.
HANE.**

Civ. 11750.

District Court of Appeal, Second District,
Division 2, California.

June 14, 1938.

1. Jury ⇨25(6)

Defendant did not waive right to jury trial by failing to demand jury within five days after receiving notice of setting of case on "pre-trial calendar," which is not synonymous with "trial calendar" referred to in statute authorizing such waiver by failure to announce that jury is required within five days after notice of setting cause on trial calendar. Code Civ.Proc. § 631, subd. 4; Const. art. 1, § 7.

"Pre" means "before, in front, in advance."

2. Jury ⇐25(8)

Defendant, calling trial judge's attention to fact that demand for jury trial had been made and requesting ruling as to whether jury trial was waived, as plaintiff contended, when case was first called on pre-trial calendar and set on trial calendar for hearing, announced that jury was required when case was first set on trial calendar and hence did not waive jury trial. Code Civ.Proc. § 631, subd. 4; Const. art. 1, § 7.

3. Appeal and error ⇐1167

A denial of right to jury trial to party entitled thereto is "miscarriage of justice" requiring reversal of trial court's judgment against such party. Const. art. 1, § 7; art. 6, § 4½.

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Fletcher W. Bowron and Charles S. Burnell, Judges.

Action by the Union Oil Company of California against Frank H. E. Hane to recover damages for conversion of gasoline. Judgment for plaintiff, and defendant appeals.

Reversed.

Murray M. Chotiner, Albert Jack Chotiner, and Russell E. Parsons, all of Los Angeles, for appellant.

Paul M. Gregg, Jerry H. Powell, Andrews, Blanche & Kline, and Douglas C. Gregg, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for the conversion of personal property defendant appeals.

The essential facts are:

November 19, 1936, plaintiff filed an action to recover damages from defendant for the alleged conversion of a large quantity of gasoline. November 30, 1936, defendant filed an answer to the complaint and on February 10, 1937, plaintiff filed with the clerk of the superior court a setting card. May 11, 1937, plaintiff served notice on defendant that the above-entitled case had been set on the pre-trial calendar for hearing May 27, 1937. May 26, 1937, a

demand for a jury trial was filed by the defendant and the sum of \$24 as jury fees was deposited with the clerk of the superior court. May 27, 1937, when the case was called for hearing on the pre-trial calendar, defendant's attorney stated to the judge that a written demand for a jury trial had been filed with the clerk of the superior court on the preceding day (May 26, 1937), that plaintiff's attorney contended that the demand for a jury trial had been filed too late, and by reason thereof defendant had waived the right to a trial by jury. Defendant then requested a ruling from the judge on this point.

In response to this request the judge ruled that a trial by jury had been waived by failure of defendant to present his demand for a jury trial within the statutory period.

Thereafter the judge set the case for trial on June 22, 1937.

Defendant relies for reversal of the judgment on this proposition:

A party does not waive the right to a trial by jury by failing to demand the same within five days after receiving notice that a case has been set for hearing on the pre-trial calendar of the superior court of Los Angeles county.

This proposition is tenable. Article 1, section 7, of the Constitution of the state of California reads in part as follows:

"The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law."

Section 631 of the Code of Civil Procedure prescribes the manner by which in civil actions the parties may consent to waive the right to trial by jury, and so far as material here reads:

"Trial by jury may be waived by the several parties to an issue of fact in manner following:

* * * * *

"4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation. * * *"

It therefore becomes necessary to decide these questions:

First: Is "pre-trial calendar" synonymous with "trial calendar" as the latter

phrase is used in section 631, Code of Civil Procedure?

Second: Did defendant fail to announce at the time the case was first set upon the trial calendar that a jury was required?

[1] The first question must be answered in the negative. "Pre" means "before, in front, in advance". VIII The Oxford English Dictionary (1933) 1234; Funk & Wagnalls Practical Standard Dictionary (1938) 892. Hence it is obvious that "pre-trial calendar" is not synonymous with "trial calendar", it being evident that the pre-trial calendar comes before the trial calendar.

Such certainly appears to have been the intention of Presiding Judge Bowron, who instituted the pre-trial calendar in the superior court of Los Angeles county, for in his circular to the members of the bar announcing the adoption of such a system, we find the following:

"The pre-trial hearing is an informal conference between attorneys for the parties and the judge. * * *

"Immediately after the filing of a memorandum for setting, a *tentative* date will be fixed which date will be as nearly as can be estimated approximately ten days prior to the *actual* date of trial. * * *

"Unless the case is continued, or otherwise disposed of by the court, at the conclusion of the pre-trial hearing the cause will be placed on an active *trial calendar* and the date of the trial will be set approximately ten days thereafter. * * *

"At the conclusion of the pre-trial hearing, cases at issue and ready for trial will be forthwith, and in the presence of counsel, set on an active trial list and the trial date fixed. This will be accomplished by continuance to a date certain and announcement by the court that the case will proceed to trial on that date. * * *

"The pre-trial calendar system is being tried as an experiment. * * *

"After the plan has been fairly tried, if it proves successful and acceptable to the bench and bar of this county, appropriate rules of the court will be drafted." (Italics added.)

It is evident that, as expressed in Judge Bowron's circular, it was an experiment and was something superimposed upon the procedure theretofore in effect and was not to take the place of the regular trial

calendar. Therefore defendant did not waive the right to a trial by jury by failing to demand a jury within five days after receiving notice of the setting of the case on the pre-trial calendar.

[2] The second question must also be answered in the negative. It is to be noted that subdivision 4 of section 631 of the Code of Civil Procedure simply requires that a party announce, i. e., "give intelligence of, proclaim, or publish", at the time the case is first set upon the trial calendar that a jury is required. We have held that on May 27, 1937 (the date of the pre-trial hearing), the case was first set upon the trial calendar for hearing June 22, 1937. The undisputed facts show that the day preceding the setting (May 26, 1937) defendant filed a written demand for a jury trial. At the time the case was first called upon the pre-trial calendar he called to the judge's attention the fact that a demand for a jury trial had been made and that plaintiff contended that a jury trial had been waived and defendant requested a ruling from the judge upon this point, which ruling sustained plaintiff's contention. We fail to see in what more appropriate manner defendant could have called the judge's attention to the fact that a jury trial was required. He certainly gave *intelligence of, proclaimed, and published it*. After seeking and obtaining the judge's ruling it would have been presumptuous, to say the least, of counsel to have insisted further upon a jury trial.

It is therefore evident that plaintiff did announce that a jury was required at the time the case was first set on the trial calendar.

[3] A denial of the right to trial by jury to a party entitled thereto is a miscarriage of justice within the meaning of that phrase as used in section 4½, article 6, of the Constitution of the state of California, which error requires a reversal of the judgment of the trial court. *People v. Hall*, 199 Cal. 451, 458, 249 P. 859; *Farrell v. City of Ontario*, 39 Cal.App. 351, 359, 178 P. 740.

It is highly important at all times to preserve the constitutional guaranties of the citizens of this state, and it may be safely said that there has never been a period in our state or national history when the necessity for court's preserving inviolate and safeguarding to the fullest extent the constitutional guaranty of a right to a

trial by jury in a proper case has been as urgent as at the present time.

This constitutional guaranty of trial by jury has been demonstrated through centuries of experience to be one of the most fundamental and cherished rights of a citizen of the United States of America and the strongest safeguard of the liberty of the citizen (be he high or low, rich or poor) against encroachments upon his freedom caused by firebrands, demagogues, or regnants exercising their influence over the people through democratic, bureaucratic, or republican forms of government.

For the foregoing reasons the judgment is reversed.

I concur: CRAIL, P. J.

I concur in the judgment: WOOD, J.



27 Cal.App.2d 166

STODDARD et al. v. ROBERTS PUBLIC MARKETS, Inc., et al.

Civ. 11434, 11456.

District Court of Appeal, Second District,
Division 1, California.

June 16, 1938.

Hearing Denied by Supreme Court
August 15, 1938.

1. Negligence ☞32(1), 37

The keeper of a public place of business must keep his premises and passageways to and from it in safe condition and use ordinary care to avoid accidents or injury to persons properly entering premises.

2. Negligence ☞136(22)

Whether a public place of business and passages to and from it are kept negligently so as to impose responsibility on keeper for injuries sustained is a question for jury.

3. Landlord and tenant ☞169(8)

Evidence did not support a customer's contention that a grocer who had leased space in a market operated entire market so as to impose liability on him for injuries customer sustained in falling in a main aisle in part of market which had been leased to a fruit and vegetable retailer.

4. Landlord and tenant ☞167(2)

A provision of a lease of part of a market to a grocer that grocer was to have supervision of market's operation did not render grocer liable for injuries a customer sustained in falling in a main aisle through space leased by a fruit and vegetable retailer but merely established an agency giving grocer any right of supervision of other lessees that lessor would have otherwise retained where no reference to such provision was made in retailer's lease and no privity existed between lessees.

5. Landlord and tenant ☞169(11)

In customer's action against a grocer, who leased space in a market, for injuries sustained in falling in a main aisle passing through space leased by a fruit and vegetable retailer, evidence was insufficient for jury in absence of evidence that grocer caused or knew of a dangerous condition in aisle.

6. Landlord and tenant ☞169(11)

In customer's action against a fruit and vegetable retailer who leased space in a market for injuries sustained in falling in a main aisle passing through such space, evidence as to retailer's negligence and knowledge of slippery condition where customer fell presented a question for jury.

7. Appeal and error ☞1001(1)

Where evidence presents a jury question, verdict will not be disturbed on appeal in the absence of prejudicial error.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Viva Stoddard, sometimes known as Mrs. R. G. Stoddard, and R. G. Stoddard against Roberts Public Markets, Incorporated, Union Products Company, and others for injuries sustained in falling in a public market. Judgment for plaintiffs, and defendants appeal.

Reversed as to first named defendant and affirmed as to second named defendant.

Gibson, Dunn & Crutcher, of Los Angeles, for appellant Roberts Public Markets.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellant Union Produce Co.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

DORAN, Acting Presiding Justice.

This is an appeal by defendants from the judgment, in an action to recover damages for personal injuries sustained by reason of the alleged negligence of defendants in the operation of a public market, where the plaintiff, who visited the market as a customer, on account of the presence on the floor of water or some slippery substance, slipped and fell, causing certain injuries from which the damages are alleged to have resulted. The market, which was located on the ground floor of a building owned by a stranger to the within action, included a grocery store, meat market, bakery, fruit and vegetable department, and a liquor store.

Defendant and appellant Roberts Public Markets, hereinafter referred to as "Roberts" or "Roberts Markets", owned and operated the grocery store. Defendant and appellant Union Produce Company owned and operated the fruit and vegetable market.

The building was approximately 100 feet in depth; a space approximately 40 feet wide, extending across the rear of the building as well as the easterly side of the building, was occupied by the Roberts Public Markets. The westerly portion of the premises was occupied by a meat market owned and operated by another tenant. The center and front of the building was occupied by defendant Union Produce Company, back of which, and between the fruit and vegetable market and the grocery store, was the bakery; on the eastern side of the building was the liquor store.

Customers visiting the grocery store entered through turnstiles located in a fence or barrier which separated the grocery store from the balance of the area. Three main aisles or entrances extended from the sidewalk into the market building. The west aisle separated the meat market from the vegetable market; the east aisle separated the liquor store from the vegetable market; and the third or center aisle extended through the vegetable market to the bakery and the grocery store in the rear.

Three or four rows of counters or tables, parallel to the sidewalk and separated by aisles, upon which the vegetables and fruits were displayed, comprised the fruit and vegetable market. It was at the end of the second row of tables in the main aisle separating the meat market from the fruit

and vegetable market, that the plaintiff slipped and fell.

Giving consideration first to the appeal of Roberts Public Markets, it is contended that there is no evidence establishing responsibility of appellant for the condition of the premises; that there is no evidence of knowledge upon the part of appellant of the presence of water or some slippery substance at the point where plaintiff fell; and that there is no evidence that such condition had existed a sufficient length of time to charge appellant with knowledge thereof.

Respondents, on the other hand, contend, as proof of appellant Roberts' liability, that appellant Roberts operated the entire market, in support of which contention it is pointed out that a large neon sign on the front of the market read "Roberts Markets Everywhere", which, it is argued by respondents, is evidence that Roberts was the proprietor; that the owners of the property, the lessors, had nothing to do with the cleaning and maintaining of the aisles and passageways of the building, but that an employee of Roberts mopped the aisles and passageways in the store once a week; that the terms of the lease between the lessor and Roberts contained the provision: "It Is Further Agreed that the Lessee is to have supervision of said market as regards operations in same"; that the aisle where plaintiff slipped and fell was the means of ingress and egress to and from appellant's grocery store; and that the cleaning of such aisle and aisles by appellant was neglected.

The evidence reveals that there was no relationship between Roberts Public Markets and the Union Produce Company; each was owned and operated independently of the other; each acquired the right to occupy the premises and conduct a business therein under and according to the terms of a separate lease executed by the owner of the building. The leases, which were substantially the same, contained a provision purporting to relieve the owner of the building of liability for damages, and a provision that the lessee should "keep and maintain the entire demised space * * in a neat, clean and attractive condition".

The Roberts Public Markets lease contained the following provision: "Whereas, the parties hereto are now in accord, the Lessor hereby leasing and the Lessee here-

by hiring and renting a certain space, known as grocery department and as designated on a Blue Print hereto attached, in said building, now, therefore it is * *." The lease between the lessor and the Union Produce Company contained the identical provision except that a fruit and vegetable department was substituted for the grocery department. The Roberts Public Markets lease also contained the following provision: "It Is Further Agreed that the Lessee is to have supervision of said market as regards operations in same."

[1,2] As appellate tribunals frequently have been called upon to review proceedings resulting from accidents similar in character to the one herein involved, the law applicable to the respective contentions of appellant and respondents appears to be reasonably well settled. In substance, the rule may be stated thus: "One who, during business hours, lawfully enters a store to purchase goods does so at the implied invitation of the owner * * * upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways of the premises, in and through which, by their location and arrangement, a customer in making purchases is induced to go, in a reasonably safe condition, so as to not unnecessarily expose him to danger or accident." *Brown v. Holzwasser, Inc.*, 108 Cal.App. 483, 487, 291 P. 661, 662, quoting *Brinkworth v. Sam Seelig Co.*, 51 Cal.App. 668, 197 P. 427. In an earlier authority the rule was declared as follows: "The keeper of a public place of business is bound to keep his premises, and the passageways to and from it, in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises. * * But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein." *Schmidt v. Bauer*, 80 Cal. 565, 567, 22 P. 256, 5 L.R.A. 580. Such has been the rule in California for many years and was recently reaffirmed in *Tuttle v. Crawford et al.*, 8 Cal.2d 126, 63 P.2d 1128. It is also the rule, when the issue is properly raised, that the question of negligence and its corresponding responsibility is one of fact. *Brown v. Hol-*

wasser, Inc., supra, and *Tuttle v. Crawford et al.*, supra.

It was further declared in a recent opinion on the same subject, "The proprietor of buildings who directly or by implication invites others to go therein owes to such persons who thus enter a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils. He is not an insurer of such persons, nor does the mere occurrence of injury on such premises to such invitee create any presumption of negligence on the part of the proprietor. His responsibility is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises." *Touhy v. Owl Drug Co.*, 6 Cal.App.2d 64, 66, 44 P.2d 405, 406.

The question was also the subject of review in *Rothschild v. Fourth and Market St. Realty Co.*, 139 Cal.App. 625, 34 P.2d 734, in which case the court held, "Defendant was under an obligation to exercise ordinary care for the safety of invitees upon its premises * * * but it has been held that the mere fact that one slips and falls is insufficient to establish a prima facie case against the defendant. [Citing cases.] However, the question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury [citing cases]; and, where there is testimony as to the conditions previous to the accident by persons who had also slipped on the same floor, such testimony is evidence tending to show notice to the defendant of the dangerous condition."

In that connection it has been declared that "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery." *Brown v. Holzwasser, Inc.*, supra, at page 487, 291 P. at page 662, quoting *Means v. Southern California Ry. Co.*, 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206.

[3,4] Referring now to the facts in the light of the foregoing authorities: First, as the record indisputably reveals, the evidence does not support respondents'

contention that appellant Roberts operated the entire market. The lease between the lessor and Roberts Markets definitely fixed the limits of the area leased by Roberts, and although the blue print referred to in the lease is not in evidence, there is no evidence whatsoever in the record establishing either directly or inferentially the fact that appellant Roberts was the lessee of that portion of the market at the point where respondent slipped and fell. The neon sign in front of the storeroom, relied upon by respondents as evidence of ownership in Roberts, is of no significance. By the terms of the lease between the lessor and Roberts, the lessor agreed to furnish and install all necessary trade fixtures, cash registers, Toledo scales, ice boxes, etc., and also the neon sign. Obviously, such act on the part of the lessor, whatever may have been the reasons therefor, is no evidence of ownership in Roberts, as contended by respondents. Likewise, respondents' contention that the provision of the Roberts lease above mentioned, namely, that "It Is Further Agreed that the Lessee is to have supervision of said market as regards operations in same," in effect created some liability, is of no consequence. In Union Produce Company's lease there is no reference to said last-mentioned provision. There is no evidence of any privity of contract between the Union Produce Company and Roberts, nor is there any evidence of privity of contract between any of the other tenants and Roberts. The legal effect, therefore, of the above-mentioned provision that Roberts was to have supervision of the market, merely established an agency between the lessor and Roberts; that is to say, whatever right the lessor retained to supervise the tenants of his property was accorded to Roberts, who necessarily had no more authority over the tenants than his principal, and that authority depended upon the terms of the various leases between the lessor and the tenants. There is also no evidence in the record that appellant Roberts assumed the responsibility of keeping any aisles clean except within the area described in the Roberts lease. It is true that the evidence reveals that an employee of Roberts mopped the aisles and passageways once a week, but this work was performed as the result of an arrangement between said employee and the other tenants, to which Roberts was not a party. There is no evidence that the condition which caused the plaintiff to fall existed any definite

or approximated length of time before the accident, nor is there any evidence that Roberts had knowledge of such condition until after the accident.

[5] It should be noted at this point that, by a comparison of the facts in the case at bar with the facts of the cases cited herein as well as with the facts of all of the cases relied upon by respondents, a significant and material difference is evident. In the case at bar the accident did not occur in the grocery store operated by Roberts, or at a point within any area leased by Roberts; whereas, in all of the cases above referred to, the accident out of which each action arose occurred, and without dispute, on the premises of the defendant in such action. Thus it will be seen that in those actions last mentioned, after proof of negligence, the question of liability was comparatively simple, but in the case at bar proof of negligence does not necessarily dispose of the question of liability. Under the circumstances herein presented, proof of the dangerous condition alone did not justify the inference that Roberts either caused or had knowledge of such condition, and the record is destitute of any other evidence that tends to establish either directly or inferentially that Roberts either caused the dangerous condition or knew of its existence until after the accident. As is indicated by the authorities above quoted, the allegations of negligence, as well as the question as to whether the alleged dangerous condition "had existed so long as to be discoverable by the defendant within a reasonable time", raised questions of fact for the jury's determination. Manifestly, as in the case at bar, when there is no evidence of either, there can be no question of fact for the jury to determine, under which circumstances a motion by defendant for an instructed verdict should be granted. There being a total lack of evidence to support the judgment, the motion for an instructed verdict on behalf of Roberts should have been granted.

[6,7] Giving consideration now to the appeal of Union Produce Company, it is contended by appellant that respondent slipped and fell in an aisle common to all concessionaires within the market, and that there was no showing of any act of negligence on the part of appellant Union Produce Company or its agents or employees. Although the wet or slippery spot,

as contended by appellant, was in one of the main aisles, nevertheless it will be remembered that such alleged dangerous condition was immediately adjacent to the vegetable market and the area leased and operated by appellant Union Produce Company. There was evidence, also, that it was customary for appellant to sprinkle the vegetables from time to time during the day. Thus the location of the alleged dangerous condition justified an entirely different inference with regard to appellant Union Produce Company than would be justified, as heretofore noted, with regard to Roberts Markets. There was some evidence in the record, therefore, not only of negligence on the part of appellant Union Produce Company, but of the likelihood of knowledge on the part of said appellant that such dangerous condition existed. There being evidence of those facts, the effect of such evidence was for the jury to determine. Under such circumstances, and in the absence of prejudicial error, the verdict of the jury will not be disturbed on appeal.

For the foregoing reasons the judgment in favor of plaintiff and against the Roberts Public Markets is reversed; the judgment against the Union Produce Company is affirmed.

I concur: WHITE, J.



27 Cal.App.2d 174

WALLACE v. KING et al.

Civ. 11438.

District Court of Appeal, Second District,
Division 1, California.

June 17, 1938.

Hearing Denied by Supreme Court
August 16, 1938.

1. Master and servant ☞310

Employees of different masters engaged on the same premises in the prosecution of one construction project were "business invitees" with a duty of exercising reasonable care for their mutual safety.

2. Trial ☞140(1)

The jury is the sole and exclusive judge of the credibility of witnesses.

3. Master and servant ☞330(3)

In action for injuries sustained by employee on excavation project when struck by descending blade of "bulldozer" operated by the employee of a different master engaged on the same project, evidence authorized recovery from operator and from his master on ground that operator had seen and heard employee's signals as employee approached but negligently permitted blade to drop.

4. Master and servant ☞327

One who is employed in a place where he is exposed to danger must exercise his faculties for his own protection, and, if he approaches a place which he knows or ought to know is one of danger, he must take reasonable precautions to avoid injury.

5. Master and servant ☞327

One who is employed in a place of danger must exercise a constant degree of care for his own protection, but the acts necessary to constitute such care may vary according to circumstances.

6. Master and servant ☞327

The determination of whether injured business invitee was barred by contributory negligence from recovering from fellow business invitee and employer depended on whether a reasonably prudent man, situated as was injured invitee, seeing what he saw and knowing what he knew, would have acted as invitee acted, and whether such conduct constituted care in proportion to the danger.

7. Master and servant ☞327

An injured employee who has been guilty of any act or omission amounting to a want of ordinary care and constituting a proximate contributing cause of his injury cannot recover for his injury from an employee of another who is engaged on the same project or from the employer of such other. Civ.Code, § 1714.

8. Master and servant ☞332(1)

In action for injuries sustained by employee on excavation project when struck by descending blade of "bulldozer" operated by the employee of another engaged on the same project, whether employee who signaled his approach as he left a place of safety was contributorily negligent was for the jury. Civ.Code, § 1714.

9. Master and servant ☞332(4)

In action for injuries sustained by employee on excavation project when struck

by descending blade of "bulldozer" operated by employee of another engaged on the same project, where evidence indicated that operator saw employee's approach, a failure to instruct on the law of unavoidable accident was not error.

10. Appeal and error ⇨1064(1)

Master and servant ⇨327

In action for injuries sustained by employee on excavation project when struck by descending blade of "bulldozer" operated by the employee of another engaged on the same project, where employee was not in danger until operator had dropped the blade, doctrine of last clear chance was not involved, but instruction thereon furnishing a yardstick by which existence or absence of operator's negligence might be measured was not reversible error.

11. Appeal and error ⇨1032(3)

Alleged error in giving or refusing instructions is not ground for reversal unless it affirmatively appears that there has been a miscarriage of justice.

12. Appeal and error ⇨1004(3)

The amount of an award for negligently inflicted injuries is for the trial court and jury to determine.

13. Appeal and error ⇨1004(1)

An appellate court cannot fix a different award for negligently inflicted injuries in the absence of a showing that verdict was the result of passion or prejudice.

14. Damages ⇨130(2)

\$6,500 damages for injuries consisting of a transverse fracture of both bones of the right leg between the knee and ankle accompanied by injury to the periosteum, and two comminuted fractures of the left foot on the instep, of which amount \$2,812 represented special damages, would not be disturbed for excessiveness in absence of showing that award was result of passion or prejudice.

Appeal from Superior Court, Los Angeles County; Chas. L. Bogue, Judge.

Action by J. A. Wallace against H. L. King and another for personal injuries. Judgment for plaintiff, and defendants appeal.

Affirmed.

George H. Moore, of Los Angeles, for appellants.

Schell & Delamer, of Los Angeles, for respondent.

WHITE, Justice.

Action to recover damages for personal injuries received by reason of alleged negligence of the defendants. Judgment was entered in accordance with a verdict for the plaintiff in the sum of \$6,500. Defendants appeal from the judgment.

Epitomized, the facts are that on a ranch in Los Angeles county a reservoir was being constructed, which at the bottom was approximately 350 feet long and 60 to 80 feet in width. The walls were sloped, and were approximately 25 feet high. This slope was what is known as a "half-to-one" slope, which means that for every foot which the wall rises it recedes half a foot. The reservoir had been excavated by machinery and the walls had been left in the rough, making it necessary to hand-trim them. This was done by men working on scaffolds which were suspended by ropes made fast to some stationary object on the top of the wall. The scaffolds were about 2½ feet wide by 6 feet long. As the men trimmed the walls, the loose dirt would fall to the base of the wall, so that when the trimming was complete upon a section there would be a pile of dirt about 2½ feet deep sloping outward from the base of the wall and extending 3 or 4 feet into the excavation. The workmen started trimming from the top of the wall. They would trim as much as could be reached and then the scaffold would be lowered, this being continued until they came close to the bottom, when they would get off the scaffold and work from the floor of the reservoir while standing on the loose dirt.

Working on the floor of the reservoir was a machine commonly known and designated as a "bulldozer", which is a large caterpillar tractor. On the front of this "bulldozer" there is a blade about 10 feet long and 3 feet wide, and very heavy, which hangs on arms and is raised and lowered by means of a cable. To raise the blade, the clutch is engaged and a lever is pulled toward the operator, while to lower it, the lever is pushed away from the operator. To stop the blade while it is descending, the lever is pulled back toward the operator. This blade is curved somewhat to the front, so as to push the dirt along, but it can also be used to pull the dirt back. The blade descends in a forward arc, and drops very quickly. The bulldozer travels about one mile per hour.

As the dirt trimmed from the walls collected at the base, the bulldozer would approach the walls, drop its blade, back away, and drag the dirt from the base of the walls, distributing it over the floor of the reservoir. To do this, the bulldozer would approach to within 6 to 12 inches of the base of the wall and drop the blade as soon as it stopped.

On the morning of December 28, 1935, respondent was working for the owner of the ranch. His work consisted of trimming the walls, in which capacity he had been employed for about a month, during all of which time the bulldozer had also been working there. The evidence indicates that respondent was familiar with the manner in which the bulldozer approached the wall, dropped its blade and dragged the dirt away. During that time appellant King was operating the bulldozer, which belonged to appellant Willis & Sons, Inc., and which machine, together with the services of King, had been rented to the ranch owner by appellants Willis & Sons, Inc.

Respondent had been working on one of the scaffolds on the southwest corner of the reservoir, with one Maxwell. They had worked down to a point where they could reach the rest of the wall by standing on the loose dirt at its base. They then climbed up the ropes of the scaffold and pulled it to the top of the wall. Following a conversation had by respondent with his foreman, the former descended by means of the ropes on the adjacent scaffold to the south upon which another man was working. Respondent was going down to stop the bulldozer operator from removing any more dirt from that particular spot. When he got about half way down the scaffold he observed the bulldozer, which was about 7 to 10 feet from the wall and moving forward. There was evidence that respondent waved and shouted to the operator of the bulldozer to stop, and also evidence that appellant King, who was operating the bulldozer, was facing respondent at that time. The bulldozer stopped as respondent waved and shouted, coming to such stop about 3 or 4 feet away from the wall, with the blade still up. There was also evidence that on previous occasions respondent had given appellant King signals while they were putting up scaffolds, to wave him out around them. There is evidence in the record that respondent continued down and got on the scaffold, which was about 5 feet above the level of the dirt at the base of the wall. It was testified

that while he was on the scaffold respondent again observed the bulldozer and its operator, appellant King, the latter of whom was still facing respondent, the bulldozer remaining motionless in the same position where it had stopped when respondent had given the first signal and shout. It was testified that respondent again waved and shouted to appellant King. After letting himself down, respondent started to walk around to the side of the bulldozer and took a step while the blade was still raised. His feet sank in the loose dirt, but he did not slip or fall. At that same instant, the blade of the bulldozer dropped, striking respondent on the top of his right leg about midway between the ankle and the knee, and also caught his left foot across the instep. After the accident appellant King told respondent that he had seen the latter leaving the scaffold, but that it was too late to stop the blade.

Respondent suffered a transverse fracture of both bones of the right leg between the knee and ankle. These fractures showed a deformity and a free motion of the bones at the site of the fractures, and were of the sliding type, where one portion of the bone tends to slide forward and the other tends to slide back. The periosteum surrounding the bones also was injured. In addition, respondent received two comminuted fractures of the left foot approximately on the instep. There was no displacement, however, with regard to these fractures. Respondent also received an open wound on the anterior aspect of the shin about an inch in diameter.

Appellants cite as their first ground for reversal that the evidence is insufficient to sustain a verdict finding defendants liable, in that appellant King and respondent were employees of different masters engaged on the same premises in the prosecution of one construction project; that under the law they were both invitees of the owner, but as to each other they were strangers between whom there was no privity of contract, and that toward each other they bore the same duty of exercising ordinary care for their safety during the progress of the work as they owed to the public generally. In short, it is appellants' claim in this regard that being without a duty to protect respondent, there can be no tortious liability imposed upon appellants.

[1-3] Appellant King and respondent both being business invitees upon the prem-

ises in question, it was therefore incumbent upon King, in operating the bulldozer, to use reasonable care. In fact, it was at the request of appellants that the court so instructed the jury. The jury was entitled to conclude from the evidence that had appellant King looked in the direction where the men were working, he could not but have observed respondent both signaling and coming toward the bulldozer. Further, the jury, being the sole and exclusive judge of the credibility of witnesses who testified in the case, was not required to believe the testimony of appellant King as to what he saw and heard, or could have seen and heard, had he looked and listened. In fact, the state of the evidence before us is such that the jury could have inferred and concluded that appellant King actually did see the signals given by respondent and as well heard the latter's shouting. The jury was entitled to believe that the reason appellant King stopped his machine short of his accustomed stopping-place was because of the giving of the first signal and shout. The record before us contains ample evidence which, if believed by the jury, warranted a finding of negligence upon the part of appellant King, and therefore necessarily, by imputation, upon the part of his employer and coappellant.

[4-8] Appellants next assert that respondent was guilty of contributory negligence which proximately contributed to his injury. They base this contention primarily upon their claim that respondent was in a place of safety as he stood upon his fellow workman's scaffold; that he was acquainted with the mechanical operations of the bulldozer and was then cognizant of the fact that the blade of the machine was uplifted above the loose dirt preparatory to descending and gathering up the same. Appellants contend that respondent at the time he left the scaffold and came down upon the loose dirt knew that he was moving from a place of safety into a position of extreme danger, unless appellant King in charge of the bulldozer was aware to a certainty of respondent's intention to leave the scaffold. Appellants earnestly urge that then and there it became the duty of respondent to ascertain and assure himself that there was no lack of knowledge upon the part of appellant King that respondent was proceeding into a position of extreme danger. Undoubtedly it is the rule that one who is employed in a place where he is exposed to danger must exercise his faculties for his own protection; and if he

approaches a place which he knows or ought to know is one of danger, he must take reasonable precautions to avoid being injured (*Gleason v. Fire Protection Engineering Co.*, 127 Cal.App. 754, 757, 16 P. 2d 750, and cases therein cited); but while the degree of care required remains constant, the acts necessary to constitute such care may vary according to circumstances (*Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 P. 976). Therefore, the question presented is whether a reasonably prudent man, situated as respondent was, seeing what he saw, and knowing what he knew, would have acted as respondent acted, and whether such conduct constituted care in proportion to the danger. If any act or omission on the part of respondent amounted to a want of ordinary care and was a proximate contributing cause of his injury, he cannot recover. Sec. 1714, Civ.Code; 19 Cal.Jur., "Negligence", sec. 74, p. 644; *Steinberger v. California Elec., etc., Co.*, 176 Cal. 386, 168 P. 570. In that connection, there is evidence in the record that prior to leaving his position on the scaffold, respondent signaled appellant operator of the bulldozer and shouted to him; that the machine thereupon immediately came to a stop at a point where it was not usual nor customary to drop the blade. Subsequently, and prior to leaving the scaffold, respondent again observed that the bulldozer was stationary and in the same position. Also respondent, at all times until he had left the scaffold, was in the plain range of vision of appellant operator, and was in the direction in which the latter was facing. Conceding the existence of evidence in contradiction of the foregoing, nevertheless, like the question of appellant's negligence, this question of respondent's contributory negligence was one of simple fact which was properly left with the jury, and it rejected appellants' theory.

[9] Appellants complain of the action of the court in giving and refusing to give certain instructions, the narration of which in detail would unduly prolong this opinion. Concerning appellants' complaint that the court neglected to instruct the jury on the law of unavoidable accident, it is sufficient to say that there was no evidence upon which such an instruction could be based. The evidence all tended to support the respective theories of the parties—that the accident was not unavoidable, but that it could have been avoided by the other party.

[10] Appellants insist that certain instructions erroneously stated the doctrine of last clear chance. The claimed doctrine was not involved in this case, since respondent was in no danger whatever until appellant King had dropped the blade. The instructions complained of in this regard merely furnished a yardstick by which the existence or absence of negligence on the part of appellant King was to be measured.

[11] It is the settled law of this state that before a reversal can be ordered on account of error committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the appellate court must affirmatively be of the opinion, that there has been a miscarriage of justice. *Haney v. Takakura*, 2 Cal.App. 2d 1, 9, 37 P.2d 170. A consideration of the entire evidence in this case does not admit of the conclusion that without the claimed error in the instructions the verdict would have been different from the verdict actually rendered by the jury. For us to say that we cannot determine from a consideration of all the evidence that the error complained of did not have that result, is not sufficient. Before we can order a reversal, our conclusion in the premises must be an affirmative one. *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752; *Haney v. Takakura*, supra, and cases therein cited at page 10, 37 P.2d at page 174.

Appellants concede that the claimed errors in the admission or rejection of evidence may not of themselves be sufficient to warrant a reversal of the judgment, but urge that taken in conjunction with other alleged errors, they demonstrate that appellants suffered prejudice through such rulings. The errors complained of in this regard were in no wise prejudicial to appellants' case.

[12-14] Finally, appellants claim that the amount of the award herein was excessive. The nature of the injuries sustained by respondent are hereinabove set forth, and it might be noted that the special damages proved amounted to \$2,812. However, no contention is made that the verdict was the result of passion or prejudice on the part of the jury, but the sole contention is that this court should adjudge a different amount to be the reasonable damages suffered. It is, of course, elementary that the amount of the award is a matter for the trial court and jury to determine, and that an appellate court cannot

fix a different amount, in the absence of a showing that the verdict was the result of passion or prejudice.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: DORAN, Acting P. J.



27 Cal.App.2d 87
MYERS v. ROSE et al.
Civ. 11758.

District Court of Appeal, Second District,
Division 2, California.
June 10, 1938.

1. Witnesses ⇨287(1)

In action by street car motorman for injuries sustained when street car collided with defendant's truck, permitting introduction of testimony of motorman on redirect examination that he had been instructed to maintain a rate of speed of about 20 miles per hour while crossing the intersection where collision occurred was not error in view of questions asked on cross-examination.

2. Witnesses ⇨287(1)

It is proper upon redirect examination to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that might arise on the matters drawn out on cross-examination.

3. Damages ⇨177

In personal injury action by street car motorman, testimony of street railroad's surgeon as to value of medical services and hospitalization, bills for which were charged to street railroad which in turn charged them to motorman, was admissible as against contention that it was not shown that motorman had incurred any liability thereon, especially in view of the fact that it appeared that street railroad had filed a lien on any judgment which motorman might recover against the defendant. *St.1937, p. 274, § 3855.*

4. Appeal and error ⇨1056(1)

In action for injuries sustained by street car motorman when street car and defend-

ant's truck collided at intersection, where there was no evidence as to violation of city ordinance relating to speed of street car, court did not commit prejudicial error in excluding city ordinance limiting speed of street cars.

5. Appeal and error ⇨757(4)

Where appellant's brief failed to comply with court rules requiring that, where instructions are attacked, all other instructions given, bearing upon the subject, must be printed in full in appellant's brief, District Court of Appeal would not consider the instructions in detail. Rules of the Supreme and District Courts of Appeal, rule 8, § 3.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Zirl Myers against Robert Vernon Rose and others to recover for injuries sustained in a collision between an interurban car of which plaintiff was motorman and a truck. Judgment for plaintiff, and defendants appeal.

Affirmed.

John H. Miller, Fred O. Reed, and Richard L. Kirtland, all of Los Angeles (Joseph D. Taylor, of Los Angeles, of counsel), for appellants.

Frank J. Ryan and Oscar O. Collins, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for personal injuries arising out of a collision between an interurban car and an automobile with a trailer. The plaintiff was operating a passenger car propelled by electric power in an easterly direction near the intersection of Main street and Palm avenue on the north and Poplar boulevard on the south in the city of Alhambra, and the defendant was operating a large truck and trailer proceeding in a westerly direction on Main street. The defendant attempted to turn to his left into Poplar boulevard at the intersection.

The cars of the Pacific Electric were upon a private right-of-way, which intersected the street at this point. The truck driven by the defendant cleared the southerly of the two double tracks of the railway company, but the trailer did not get across and was hit by the electric

car operated by the plaintiff. The alleged negligence consists in the operation of the truck and trailer in such a manner as to have caused its collision with the car of which plaintiff was motorman. The right-of-way was unpaved, except at the crossing, and the tracks were unballasted, with the exposed ties and "T" rails projecting their full height above the level of the ground. The tracks were utilized by an interurban track line. On either side of Poplar boulevard the railroad was operated on its private right-of-way.

[1,2] Defendant complains that upon redirect examination of the plaintiff the following questions and answers were permitted by the court: "Q. Does he as instructor give you instructions how to operate your car? A. Yes. Q. Have you been given any instructions as to the rate of speed at which you were to cross this intersection? [Objected to by the defendant as incompetent, irrelevant and immaterial and upon the further ground that any instruction by the Pacific Electric Railway Company would be hearsay so far as this defendant is concerned.] By the Court: Overruled. A. About twenty miles per hour." But the matter had been opened up and gone into by counsel for defendant on cross-examination prior to this: "Q. [By the defendant.] You have orders, don't you, as to how to operate your train along this particular track? * * * Isn't it a fact that you were instructed not to proceed across this intersection at a speed greater than fifteen miles per hour? A. No, sir." Under the circumstances the plaintiff was entitled to a reasonable opportunity to inquire into the instructions on redirect examination. Upon redirect examination it is proper to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that might arise on the matters drawn out on cross-examination. *People v. Corey*, 8 Cal.App. 720, 725, 97 P. 907.

[3] The defendant next contends that the trial court committed prejudicial error in not striking the testimony of Dr. Weber as to the reasonable value of medical services and hospitalization for which the defendant contends the plaintiff incurred no liability. In this behalf the record shows that Dr. Weber testified that he was the chief surgeon of the Pacific Electric Railway Company and, after qualifying himself, testified as to the reasonable value of

the medical services and hospitalization. He then testified that the bills were charged to the Pacific Electric Railway Company by the hospital and by him and then the company made a charge to Mr. Myers. The doctor then testified that except for approval of bills which came to his office he knew nothing about the office mechanics of how the bills were charged. It was upon this state of the record that the defendant moved to strike out Dr. Weber's testimony as to the reasonableness of his charges on the ground that the evidence showed that the bills were only charged to the Pacific Electric Railway Company. The motion was not good. Furthermore, the record shows that the Pacific Railway Company had filed a lien on any judgment which the plaintiff might recover against the defendant, and the evidence was admissible under the Workmen's Compensation Insurance Act, St.1937, p. 274, section 3855.

[4] The defendant next complains that the court committed prejudicial error in excluding an ordinance of the city of Alhambra which prohibits the speed of street cars in excess of twenty miles per hour in a residence district, and which defined the term street car to be "every device travelling exclusively upon rails when upon or crossing a street other than a device propelled by steam". There was no evidence that the car was going more than twenty miles per hour in the intersection involved, nor that the ordinance had been violated. The defendant's contention is untenable.

[5] Finally, the defendant complains that the court committed prejudicial error in several of its instructions to the jury. But in this regard the defendant wholly failed in his brief to comply with rule VIII, section 3, Rules of the Supreme and District Courts of Appeal, which provides, among other things, that "where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief". For this reason we do not discuss the instructions in detail. It is sufficient for us to say that there was no reversible error with regard to the instructions.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

LONGWAY v. NEWBERY et al. *

Civ. 6005.

District Court of Appeal, Third District,
California.

June 17, 1938.

As Modified on Denial of Rehearing
July 16, 1938.

Hearing Granted by Supreme Court
August 16, 1938.

1. Limitation of actions ☞95(1)

Where Michigan resident bought California land while visiting in California in November, 1926, relying on understanding that trust provided for installation of all improvements without cost to purchaser, but left California next January and never returned, and was informed in the ensuing October that no improvements had been made, but relied on trustee's assurances that improvements would be or had been installed, his suit in 1934 to rescind was not barred by limitations.

2. Vendor and purchaser ☞119

Where nonresident bought land relying on representations that improvements would be installed without cost to purchaser, and trust company acting as trustee in the transaction obtained payments from purchaser by representing that improvements would be or had been installed, trust company to whom owner assigned his interest was estopped from defending on ground of delay in purchaser's suit to rescind the purchase. Code Civ.Proc. § 1962, subd. 3.

3. Limitation of actions ☞195(3)

One pleading the statute of limitations has burden of establishing the defense. Code Civ.Proc. § 458.

4. Vendor and purchaser ☞39

The statutes requiring map by reference to which lots are sold to be filed with county recorder, under penalty of fine or imprisonment, do not invalidate sale by reference to unrecorded map. St.1907, p. 292, §§ 8, 9.

5. Vendor and purchaser ☞44

In suit to rescind purchase of realty, evidence held not to establish that unrecorded map by reference to which sale was made gave boundaries identical with recorded map of the tract. St.1907, p. 292, §§ 8, 9.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Claude J. Longway against Cad M. Newbery and others, for rescission

and for money had and received. From a judgment for defendants, plaintiff appeals.

Reversed and judgment directed.

J. K. Wilson, of Los Angeles, for appellant.

Anderson & Anderson and Arch Vernon, all of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action is for rescission and money had and received. The cause went to trial on an amended complaint for rescission, a demurrer having been sustained without leave to amend as to the action for money had and received.

Longway was a resident of Michigan, and while on a visit to California in November, 1926, agreed to purchase two lots in a tract near San Fernando in Los Angeles county, belonging to C. W. Newbery, and for whom Title Insurance & Trust Company was acting as trustee. Plaintiff paid to the trust company \$4,270, being the full purchase price of two lots described in an unrecorded map as lots 11A and 11B, and received therefor a receipt stating, "Trust No. S-7334 of the Title Insurance & Trust Co. provides for the installation of the following improvements: sidewalks, curbs, streets, electricity, gas and water at no cost to purchaser." Thereafter the trust company sent to Longway in Detroit, two deeds dated November 26, 1926, and on the outside of one of the deeds was endorsed "lot 11A", but in the body of the deed described the property as the northeasterly twenty-five feet of lot 11, tract 9179, sheets 1 and 2 as per map recorded, etc., and on the outside of the other deed "lot 11B", in the body of which the property was described as all of lot 11 in tract No. 9179 except the northeasterly twenty-five feet thereof, etc. Some few months after plaintiff returned to Detroit he heard the improvements were not being made. He made inquiry of Mr. Newbery and the trust company and various letters were exchanged to which we will make reference hereafter. This correspondence continued until shortly before suit was filed July 16, 1934.

The cause proceeded to trial where the court found the Title Insurance & Trust Company was the trustee in an agreement wherein C. W. Newbery (who has since died) was beneficiary. Cad M. Newbery,

his widow and executrix of his estate, succeeded to all of the estate of C. W. Newbery, but prior to his death, C. W. Newbery had assigned all of his interest in and to the tract to defendant Title Insurance & Trust Company.

The court found that plaintiff entered into an agreement to purchase two tracts described upon an unrecorded map as lots 11A and 11B, and paid therefor the full purchase price, and that the agreement provided for the installation of sidewalks, curbs, streets, electricity, gas and water at no cost to the purchaser. The court found these improvements had not been made, and also found that the unrecorded map upon which the lots were designated as 11A and 11B was substantially a copy of a later recorded map of tract 9179, wherein the lots were described as lot 11,¹ and that the property was identical. The court also found certain improvements had not been made, but held the failure was not due to any fraudulent intent on the part of the defendants or either of them. The court found it was not true that plaintiff in 1934 discovered for the first time that the improvements had not been made, but that in 1927 plaintiff was informed that all of said improvements had not been made, and found the action was barred by various statutes of limitations, and based upon these findings, judgment was entered against plaintiff.

Respondent relied strongly upon the statute of limitations. Examining this contention we find that plaintiff was a resident of Michigan, and was in California from November, 1926, to January, 1927, and after leaving California in January, 1927, has never returned to California. In October, 1927, plaintiff wrote to the trust company that he had been told no improvements were being made on the tract. Under date of October 13, 1927, the trust company replied: "It is our understanding Mr. Newbery caused certain provisions to be made with reference to the installation of improvements in the tract which improvements have not yet been installed. We notified Mr. Newbery several days ago that the Company would expect him to take immediate action to make the said improvements, and it is hoped he will commence work within the very near future."

In a letter from the trust company to Longway in April, 1928, the trust com-

pany said: "Our reports indicate that most of these improvements have been fully installed and the beneficiaries in both Trusts are bonded to fully complete the improvements according to their promises. * * *

Also in April, 1928, Newbery wrote to plaintiff: "We have been very busy installing our improvements, and I regret very much that you cannot come to California at this time, since the tract now presents a very pleasant appearance, and I am sure that you would be pleased with the present situation, and our prospects for the future. * * * the only lots you own in my tract are 11A and 11B Tract 9179."

It is in evidence that plaintiff had faith and confidence in defendants, and living as he was, several thousand miles from California, relied upon the information forwarded by them. Notice of rescission was given by plaintiff to defendants in July, 1934.

In regard to the installation of the water system, it appears that about February 6, 1929, Mr. Schafter, an assistant trust officer of the trust company, for the first time notified Mr. Longway that the city of Los Angeles had created a municipal improvement district, embracing this land, and had assessed the entire tract for the cost thereof, payable in annual instalments over a period of 38 years, and that it could not be paid in a lump sum. The letter stated the trust company had attempted to compute a fair and equitable figure and proposed that it rebate to plaintiff the sum of \$69.02 as the estimated proportion of the cost chargeable to Mr. Longway. Plaintiff objected to this amount. Negotiations were carried on for some time, and in 1931 the trust company suggested to Mr. Newbery that he attempt to settle with Mr. Longway. After considerable investigation it developed that the total payment at the end of the 38-year period would, according to the estimate by the district, amount to \$591.28. In addition to failure to furnish water to the tract at no cost to the purchaser, Sayer avenue was not paved, nor were curbs, gas and electricity installed.

Among other findings, the court found that defendants never advised plaintiff that the specified improvements could not and would not be installed by them.

In *Link v. Jarvis*, 5 Cal.Unrep. 750, 33 P. 206, plaintiff alleged he gave defendant

\$600 under an agreement that defendant would do for plaintiff certain specified things which defendant later refused to do. Plaintiff sued for this damage in the sum of \$600. Plaintiff pleaded in bar the statute of limitations. The court held the statute did not begin to run against the claim until there was a refusal to perform.

In *Ocean Shore R. Co. v. Spring Valley, etc., Co.*, 60 Cal.App. 43, 212 P. 215, the Ocean Shore Company paid to Spring Valley some \$50,000 for a right of way to be designated by the engineer of defendant. No steps were taken by the water company to locate the right of way. Upon demand of the railroad company to deliver the deed, the water company refused, claiming the railroad company had forfeited its right to such deed. To the action brought by the railroad company to recover the money paid, the water company set up the statute of limitations. On appeal, however, the court held under the circumstances the cause of action was not barred.

[1] While it was held in *Meherin v. San Francisco Produce Exchange*, 117 Cal. 215, 48 P. 1074, 1075, that "what is to be considered a reasonable time for this purpose does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action," it would appear in the instant case circumstances justify the time taken by plaintiff. He was a nonresident and had to depend upon others for his information. He was assured by the seller that the installation of the improvements was being prosecuted. Later the trust company, upon whom he surely should have had the right to rely, told him the improvements were all completed.

[2] However, if these circumstances do not justify the delay by plaintiff, for another reason defendants should not be permitted to evade liability and refuse to perform the terms of their contract, and retain the money plaintiff had paid them to perform the work, and that is by reason of estoppel. Section 1962, subdivision 3, of the Code of Civil Procedure provides:

"Whenever a party has, by his own declaration, act, or omission, intentionally

and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

In *Perry v. Magneson*, 207 Cal. 617, 279 P. 650, it was held a surety company could not hold out hope of an adjustment of claims and then delay action and then set up the delay as a defense. In 16 California Jurisprudence, page 576, the statement is made: "If one by fraudulent acts or misrepresentations induces another to delay in bringing suit upon his cause of action until after the expiration of the statutory period, he is estopped to take advantage of the defense that the cause of action is barred." In the instant case the facts necessary to constitute an estoppel were pleaded and by the court found to be true.

In *Wilson v. Rigali & Veselich*, 138 Cal. App. 760, 33 P.2d 455, an action was brought to rescind two contracts for the purchase of real property on the ground of fraud, the defendants having represented they would resell the property in a short time at a profit and that certain improvements would be commenced and completed. There also, as here, defendants reiterated their promise to plaintiff and advised plaintiff to wait until the improvements were installed, which plaintiff did. Later, in an action to rescind, defendants set up the delay but the court held they were estopped from raising that defense.

[3] Under section 458 of the Code of Civil Procedure the burden rests upon the party pleading the statute of limitations to establish the same, which in this case defendants failed to do. Furthermore under the facts here we doubt if a claim for money deposited with a trust company is barred by limitations, the money here being held by the company as trustee for a specified purpose.

[4] The next question has to do with the identity of lots 11A and 11B of the unrecorded map and lot 11 of the recorded map. The finding of the trial court is that the two descriptions are identical. Plaintiff contends that the entire transaction is void, being prohibited by section 8 of the Statutes of 1907, page 290, 292, which requires that before a lot is sold

by reference to a map or plat such map must be filed with the county recorder, and section 9 declares any person who violates the act is guilty of a misdemeanor. We find nothing that would compel the court to hold such sale void; the penalty for such an act is fixed as fine or imprisonment.

[5] We are in accord with the next contention, however, which is that the evidence does not support the finding of the court that the exterior boundaries of the recorded and the unrecorded maps are identical. An examination of the two maps in evidence do not support that finding. Also, the court in admitting the evidence of a surveyor over objection of plaintiff said: "The objection will be overruled. I cannot tell from these maps whether or not it is the same land and require some assistance."

There are no surveyor's monuments indicated on the unrecorded map; the exterior boundaries of the tract are not indicated, and in fact the unrecorded map seems to indicate Sayer avenue as being a part of the tract, while the recorded map shows the center line of Sayer avenue as a boundary line. One of the matters in dispute between the parties here had to do with the cost of improvement of this avenue. It is quite evident that the two maps are not identical, nor from the information on the unrecorded map can the tract itself be determined unless some investigation is made outside the map itself.

Many other points are urged by plaintiff but we believe enough has been said to indicate that the judgment should be reversed and the trial court directed to enter judgment for plaintiff and against the defendants herein, as their respective interests may appear, in the sum of \$4,733.64, with interest thereon from July 11, 1934, upon tender by plaintiff of a deed conveying to defendants whatever right or title he may have acquired in the property herein.

It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

27 Cal.App.2d 77

ERICKSON v. VOGT.

Civ. 2054.

District Court of Appeal, Fourth District,
California.

June 9, 1938.

Hearing Denied by Supreme Court
August 8, 1938.

1. Courts ⇨95(2)

Decisions from courts of other states construing differently worded statutes are not binding on California reviewing court construing California statute.

2. Automobiles ⇨245(24)

In guest's action against automobile driver for injuries suffered when driver fell asleep and automobile collided with pole, whether guest could recover under statute requiring that injuries proximately resulted from "intoxication or willful misconduct," was for jury under evidence that driver had been drinking and a short time previously had fallen asleep and almost had an accident. St.1935, p. 154, § 403.

3. Automobiles ⇨201(6)

In determining whether guest's injuries proximately resulted from driver's "intoxication or willful misconduct" as required by statute in order for guest to recover, it is sufficient if the act, or failure to act, be under such circumstances as would justify reasonable inference that the driver should have known that injury to guest was a probable result. St.1935, p. 154, § 403.

4. Automobiles ⇨181(1)

Under statute requiring guest's injuries to be the proximate result of "intoxication or willful misconduct," in order for guest to recover, "intoxication" involves a numbing of the faculties so as to affect the capacity to observe, to recollect or to communicate. St.1935, p. 154, § 403.

"Under the influence of intoxicating liquors" means what common usage has ascribed to the word, not that driver should be intoxicated to the extent that his faculties are completely impaired, but only that degree of influence which loosens the bonds of self-restraint and causes driver to operate automobile in a manner different from that in which it would be operated by an ordinarily cautious and prudent person.

[Ed. Note.—For other definitions of "Intoxicated; Intoxication" and "Under the Influence of Liquor," see Words & Phrases.]

5. Automobiles ⇨245(24)

Evidence that a person had been drinking intoxicating liquor and thereafter drove automobile in a negligent manner does not establish as a matter of law that he was driving while under the influence of intoxicating liquor, so as to authorize recovery by guest for injuries sustained. St.1935, p. 154, § 403.

6. Automobiles ⇨245(87)

In guest's action for injuries sustained when driver fell asleep and automobile collided with pole, that guest and driver had been drinking together and that guest knew that driver had previously fallen asleep did not establish guest's contributory negligence as matter of law. St.1935, p. 154, § 403.

7. Appeal and error ⇨927(7)

Upon appeal from a judgment on directed verdict for defendant, plaintiff is entitled to have every legitimate inference drawn in her favor.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Doris Linnea Erickson against Eldon Lee Vogt, for injuries suffered while a guest in defendant's automobile. From a judgment on an instructed verdict for defendant, plaintiff appeals.

Reversed.

Sloane & Steiner and John W. Holler, all of San Diego, for appellant.

Arthur F. H. Wright, of San Diego, for respondent.

HAINES, Justice pro tem.

On the evening of January 19, 1937, appellant accompanied respondent to a dance at Bostonia, about 15 miles east of San Diego. They were on their way back to San Diego somewhat after midnight, that is in the early morning of January 20th, in an automobile which respondent drove, and in which appellant was riding as his guest, at a speed of from thirty to thirty-two miles per hour, when respondent dozed off to such an extent that the automobile scraped the curb. He says that he had not previously felt sleepy. He claims to have spoken to appellant thereafter in order to make sure that he should not fall asleep again, though he says that he did not think he would be likely to do so. However, he did in fact doze off again, whereupon the car which he

had been driving struck a pole, and the damage for which appellant here sues resulted. Both parties had done some drinking in the course of the evening. Respondent testified that after the first dance, "we sat at the bar; I ordered a bottle of beer which I drank, not in a hurry. During the evening we kept on dancing most of the time. I also had a mixed drink in between." He thinks that was about ten or ten thirty. The mixed drink "was some drink with gin in it; they have ready prepared drinks there; I tried one of those; I am not sure whether it was a gin fizz or a Tom Collins; I rather think it was one of them, in fact I know it was". He testified that he had a second bottle of beer about half an hour before leaving for town. Finally he concluded that what he had referred to as beer was really ale. The bottles that contained it were pint bottles. A police officer who saw respondent at about 1:55 a.m. at the east San Diego police station testified that respondent showed no signs of intoxication and that he noticed on him no smell of liquor. Appellant says that at the time respondent had the first bottle of ale she had a bottle of beer; that later he ordered a whiskey sour for her which she tasted but did not like, whereupon he drank it. She thinks he had a drink or two of gin in the course of the evening, also that he ordered and drank some ale just before they left. She had herself dozed off more or less on the road home, was awakened from a doze at the time the car scraped the curb, but was wide awake when the collision with the pole occurred.

The court at the close of the evidence instructed the jury to find a verdict for respondent, and this having been done, judgment was entered accordingly and this appeal followed.

Appellant claims that, though she was undoubtedly respondent's guest, the case presented was one in which the jury should have been allowed to pass on the question of willful misconduct on the part of respondent driver and on the further question as to whether respondent was not driving while under the influence of liquor.

Under the provisions of section 403 of the Vehicle Code, St.1935, p. 154, as in force, at the time of this accident, appellant, having been a guest of respondent, could have no cause of action against him for her injuries unless they proximately resulted from his "intoxication or willful misconduct".

The first contention, in appellant's behalf, is that willful misconduct appears from the

circumstance that, after once having fallen asleep, respondent nevertheless continued to drive and thereby took the risk of falling asleep again. In that connection we are cited to the definition of willful misconduct given in *Turner v. Standard Oil Co.*, 134 Cal.App. 622, 626, 25 P.2d 988, 990, which is that:

"'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

This definition is adopted as a satisfactory one in *Meek v. Fowler*, 3 Cal.2d 420, 425, 45 P.2d 194, and in *Weber v. Pinyan*, 9 Cal.2d 226, 232, 233, 70 P.2d 183.

Our attention has been called to three cases from other jurisdictions in which a driver's continuing to drive after having reason to know that there was danger of his falling asleep has been held to have been more than ordinary negligence. One of these is *Potz v. Williams*, 113 Conn. 278, 155 A. 211, a guest case, wherein the statute required the plaintiff as a prerequisite to recovery to prove "reckless misconduct", and such continued driving after warning of the danger of falling asleep was held sufficient proof of it. The second of these cases is *Freedman v. Hurwitz*, 116 Conn. 283, 164 A. 647, where in like circumstances a similar result was reached. The third case is *Manser v. Eder*, 263 Mich. 107, 248 N.W. 563; where, as in the instance case, the driver after having once fallen asleep had insisted on continuing to drive and fallen asleep again, with a resulting accident. Under the Michigan statute it would have been sufficient to warrant a recovery for the plaintiff, the guest, to have shown either gross negligence or willful and wanton misconduct on the part of the driver. The court held that by reason of the defendant's insistence on driving after being warned of his drowsy condition and narrow escape from one accident, the trial court was justified in holding that he had evinced a "reckless disregard for the consequences of an obvious danger" such as amounted to "willful and wanton misconduct" (page 564).

[1] The three cases last cited are not, of course, binding upon us, and the Connecticut guest statute does not use the words

"willful misconduct", but uses instead the expression "reckless misconduct", but the latter expression can hardly mean less than a conscious disregard for manifest danger. It is, of course, true that in *Weir v. Lukes*, 13 Cal.App.2d 312, 56 P.2d 987, 988, quoting from *Helme v. Great Western Milling Co.*, 43 Cal.App. 416, 185 P. 510, it was said that willful misconduct "means something different from and more than negligence, however gross", and also that "to constitute 'willful,' misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with the conscious failure to act to the end of averting injury".

It is also true that in *Forsman v. Colton*, 136 Cal.App. 97, 28 P.2d 429, the court quoted with approval *Kaplan v. Kaplan*, 213 Iowa 646, 239 N.W. 682, in which it was *inter alia* held that the circumstance that a person while driving along the highway is involuntarily overcome by sleep does not make him guilty of the reckless operation of the automobile within the meaning of the law. So, too, it was said in *Rode v. Roberts*, 11 Cal.App.2d 638, 642, 54 P.2d 498, 500, that even though the defendant had been driving the car while drowsy "such fact might indicate negligence, but not willful misconduct".

[2] The facts involved in the case at bar are, on the other hand, distinguishable from the situation just referred to, in that, as in *Manser v. Eder*, *supra*, where the defendant, having fallen asleep just escaped hitting a safety zone, so here respondent having once dozed off and been awakened by scraping the curb, the jury might properly have believed that he had his attention sufficiently called to the dangers incident to his drowsy condition. Such a conclusion might be further fortified by the circumstance that he admittedly talked to appellant in order to be sure that he kept awake. As was stated by this court in *Wright v. Sellers*, 78 P.2d 209, 212:

"On the one hand are numerous cases in which the appellate and Supreme Courts found no difficulty in holding that the acts of a driver of an automobile constituted willful misconduct. On the other hand are an equal, if not a greater number of cases where the acts relied upon were held, as a matter of law, not to constitute willful misconduct. Between these two fairly well defined zones of decision appears another

class composed of what may be called border line cases."

In our opinion the instant case so far as the question of willful misconduct is concerned is an example of the border line cases just referred to, and as further said in the decision last cited:

"In this class of cases, frequently, though not always, it has been held that the question of the existence of willful misconduct is one of fact addressed to the trier of fact and not one of law for the appellate court."

As was again said in *Wright v. Sellers*, 78 P.2d 209, page 215, with respect to the matter of proof:

[3] "It is sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result, for again, positive evidentiary proof of such knowledge would be an impossibility in most cases."

In the circumstances we think that the question whether respondent was or was not guilty of willful misconduct was in the instant case one of fact for the jury, rather than of law for the court.

Not only, however, would it have sufficed, in order to make a case to the jury, for appellant to have adduced enough evidence to require the jury to pass on the question of respondent's willful misconduct, but it was also appellant's contention that respondent was driving while intoxicated. We think the circumstances such that this question, too, ought to have been left to the jury. As said in *People v. McKee*, 80 Cal.App. 200, 205, 251 P. 675, 677:

[4] "'Under the influence of intoxicating liquors' means what common usage has ascribed to the word, to wit: Not that he should be intoxicated to the extent that his faculties are completely impaired, but only that degree of influence which loosens the bonds of self-restraint and causes him to operate his car in a manner different from that in which it would be operated by an ordinarily cautious and prudent person."

We recognize, of course, that it is true, as said in *Tracy v. Brecht*, 3 Cal.App.2d 105, 111, 39 P.2d 498, 501, quoting from *Wigmore on Evidence*, section 933, that:

"'Intoxication, if it is of such a degree as to deserve the name, involves a numbing of the faculties so as to affect the capacity to observe, to recollect or to communicate.'"

Furthermore, we are in accord with the expression upon which respondent relies from *Tomlinson v. Kiramidjian*, 133 Cal. App. 418, 422, 24 P.2d 559, 560, that:

[5] "From evidence that a person had been drinking intoxicating liquor and thereafter drives his car in a negligent manner, it does not follow as a matter of law that he was driving while under the influence of intoxicating liquor."

We think, however, that so far as the facts of the instant case are concerned, the application of the principles just referred to must be understood in connection with the controlling authority of *Lindemann v. San Joaquin Cotton Oil Co.*, 5 Cal.2d 480, 55 P.2d 870, where, so far as the question of intoxication was concerned the facts were strikingly similar to those in the case at bar. It was there holden that the trial court was justified in permitting the jury to pass on the question of the defendant's intoxication, since it was a matter upon which, under the evidence, reasonable minds might differ. It is our opinion that the same situation existed here.

Respondent's final position is that where the guest, plaintiff, participates in drinking with the driver, defendant, and knows defendant's condition, the guest cannot recover, even though the driver was intoxicated. This contention is founded on the well-reasoned authority of *Schneider v. Brecht*, 6 Cal.App.2d 379, 44 P.2d 662, in which a rehearing was denied by the Supreme Court. There both plaintiff and defendant had engaged together by mutual consent in an orgy of drinking extending over the most of an afternoon, after which the plaintiff entered the automobile which the defendant drove. The driving was so negligently done as to bring about an accident. The court found as a fact that the plaintiff, when she entered the automobile, knew of the defendant's intoxicated condition, and knew that the defendant's intoxication had reached such an extent that the defendant was incapable of careful driving. In these circumstances it was said (pages 383, 384, 44 P.2d page 664):

"While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a

part of, and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had."

[6, 7] We do not question the cogency of this reasoning nor the correctness of the result which the court in that case reached. But the situation in the instant case is different. We do not have before us either a verdict found by the jury upon submission of the case to it upon the evidence or any findings of fact by the trial court. It is not, therefore, a question of the legal effect of such a verdict or of such findings. What we have here is a verdict for the defendant brought in under the court's instruction. Upon an appeal from such a verdict appellant is entitled to have every legitimate inference drawn in her favor. While it is true that in the instant case the parties had both been drinking during the time they were at the dance hall, and had the case been submitted to the jury it might have found respondent to have been so far intoxicated as to affect the safety of his driving, either by making him drowsy or otherwise, still the evidence does not indicate that his appearance was such as necessarily to warn appellant of his inability properly to drive. So far as appears she may have had no reasons for real apprehension, at least until he fell into the doze and grazed the curb, and may not, even then, be chargeable with fully realizing her danger or being in any position to have avoided it. Instead of being parallel in its facts to those with which the court was confronted in *Schneider v. Brecht*, the facts in the instant case are almost exactly parallel to those in *Lindemann v. San Joaquin Cotton Oil Co.*, *supra*. That, too, was a guest case. There, too, the parties had been drinking together. There the accident was found to have been due to the driver's intoxication, as, so far as we can see, the jury might here have found it due to respondent's intoxication. Despite all this the Supreme Court, in *Lindemann v. San Joaquin Cotton Oil Co.*, sustained a verdict in the plaintiff's favor and held that it was not only for the jury to decide whether the defendant was intoxicated or not, and whether, if intoxicated, that was the proximate cause of the accident, but also whether the plaintiff knew the defendant to have been so intoxicated as to make his driving dangerous. The court said (page 501, 55 P.2d page 880):

"There is no merit in the suggestion or contention that the evidence which tended

to establish the intoxication of defendant Ewing to the degree which would render him liable for the injuries and damages suffered by reason of the accident is necessarily conclusive of the question as to whether plaintiff had, or should have had, knowledge that Ewing was so far affected by intoxicating liquor as to defeat his claim for damages. If that is true, then every person riding as a guest would be defeated by proof of the single fact that the driver was not in a fit condition to drive the automobile. The question upon which liability depends is whether the plaintiff knew, or should have known, that defendant Ewing was not in a fit condition to drive his car on the occasion of the accident."

In the light of the Lindemann case we cannot say that the mere fact that appellant had to some degree been drinking with respondent prior to starting home either estops her from prosecuting this action or renders her as a matter of law guilty of such negligence as to preclude a recovery.

The judgment is reversed.

We concur: MARKS, Acting P. J.; JENNINGS, J.



27 Cal.App.2d 111

GREENBERG v. DU BAIN REALTY CORPORATION et al.

Civ. 6046.

District Court of Appeal, Third District,
California.

June 14, 1938.

Rehearing Denied July 12, 1938.

Hearing Denied by Supreme Court
August 11, 1938.

1. Limitation of actions ☞95(1)

An action instituted February 10, 1932, to rescind realty purchase contracts for failure of vendors to improve the realty including paving of streets as agreed, was barred by limitation where all the improvements that were made were completed in 1925, and the purchaser either saw the property and improvements thereon during latter part of 1927 or beginning of 1928, or was unable to reach the property because of condition of streets which were not paved by vendors,

and therefore purchaser had notice of vendors' failure to improve the realty at least in early part of 1928, notwithstanding fact that purchaser was outside of the state from year 1928 until 1931. Code Civ.Proc. § 338; Civ.Code, § 1691.

2. Limitation of actions ☞197(2)

In action to have contracts for purchase of realty rescinded for failure of vendors to improve the realty as agreed, evidence held to sustain judgment for vendors on ground that the purchaser was placed upon inquiry to ascertain the facts constituting the alleged fraudulent representations, in the latter part of 1927, or beginning of 1928, so that the action which was brought February 10, 1932 was barred by three-year limitation. Code Civ.Proc. § 338; Civ.Code, § 1691.

3. Limitation of actions ☞100(11, 12)

In an action based on fraud where circumstances would put a person of ordinary intelligence on inquiry or there are gross laches in defrauded party's not making an effort to discover the real facts which might have been discovered by use of slight diligence, the statute of limitations cannot be avoided and the knowledge which thus might have been obtained is imputed as of the time of commission of the fraud. Code Civ.Proc. § 338.

4. Limitation of actions ☞100(1)

An action to rescind a contract because of fraud must be begun promptly upon discovery of the fraud. Civ.Code, § 1691.

5. Limitation of actions ☞66(6)

In action to have realty purchase contracts rescinded for failure of vendors to improve the realty as agreed, the running of statute of limitations did not depend upon any demand for performance and began to run from the time the purchaser discovered that the promises of the vendors were not being fulfilled. Civ.Code, § 1691; Code Civ.Proc. § 338.

6. Appeal and error ☞1008(1)

The question of laches is primarily one for the determination of the trial court, and its conclusions will not be set aside by an appellate court if there is reasonable support for the conclusions in the evidence.

7. Appeal and error ☞994(3), 1012(1)

It is the province of the trial court to determine the credibility of witnesses and the weight to be given to their testimony.

8. Limitation of actions ⚖️5(1)

The statute of limitations is binding upon courts, irrespective of the fact that many people take advantage thereof to escape the penalty of their wrongdoing. Code Civ.Proc. § 338.

Appeal from Superior Court, Los Angeles County; C. W. Miller, Judge.

Action by Joseph Greenberg against the Du Bain Realty Corporation and others to have two contracts for the purchase of realty canceled or rescinded. From an adverse judgment, the plaintiff appeals.

Affirmed.

Joseph Greenberg, in pro. per.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the appellant on the 10th day of February, 1932, for the purpose of obtaining a decree of the court canceling or rescinding two certain contracts for the purchase of real estate, and to recover the instalment payments made on said contracts. The defendants had judgment, and from this judgment the appellant appeals.

The complaint in the action sets forth the various transactions had with the defendants, and the basis for rescission and recovery of the instalment payments made upon the contracts, sounds in fraud and misrepresentation, it being set forth in the complaint that the appellant was induced to enter into the contracts for the purchase of two lots, for which the defendants were either sellers or agents for the sellers, which representations were to the effect that certain improvements were to be made upon the tract in which the lots contracted for by the appellant were and are situated.

The complaint further sets forth that the improvements were not made according to the promises, and that the defendants failed to comply with their promises, and have abandoned all efforts to improve the lots according to the promises and representations made orally to the appellant, and also by certain advertising matter, exhibits of which are set out in the transcript.

We may here state that the advertising matter, as shown by the exhibits, promised paved streets, sidewalks, water mains, gas mains and electric lights. We may here add that if the exhibits set out in the transcript are correct representations of the advertising matter published and distributed by the Du Bain Realty Corporation (a selling agent for the tract), the form and appearance thereof are such as to place a reasonable man upon inquiry as to the character and reliability of the alleged selling agents. There is sufficient testimony in the record to justify the allegation that the defendants did not, and that the Du Bain Corporation did not, and never did intend to, comply fully with its oral promises or with the statement made in the printed matter published and circulated by it. In other words, there is ample testimony in the record to justify the conclusion that the contracts of purchase relative to the lots in controversy were procured by misrepresentation as to what improvements were to be made upon the streets adjoining the lots contracted to be purchased by the appellant. However, from the status of the case, the testimony herein after referred to, and the findings of the court, we need not discuss what is alleged to be the fraudulent character of the transaction.

The court found that the appellant was guilty of laches, and that the action was barred by the statute of limitations. While as a matter of justice we may admit that there is sufficient in the record to show that the appellant in good conscience should recover the money paid for the lots in question, we find no escape from the conclusion of the court upon the question of laches and the statute of limitations. The record shows the following: On or about October 8, 1923, the appellant entered into a temporary contract, for the purchase of the two lots involved in this action. Thereafter, on February 20, 1924, appellant assigned his interest in the temporary contract to one L. Lee Bernstein. On May 14, 1924, L. Lee Bernstein entered into two formal contracts of purchase with the Pacific Southwest Trust & Savings Bank (now called the Security First National Bank of Los Angeles). On August 1, 1924, L. Lee Bernstein assigned his interest in the two formal contracts to the appellant. The contract provided for full payment of the purchase price within three years after date, which would be some time

during the year 1927. Appellant did not pay the full purchase price according to the contract, but did continue to make installment payments up to the month of October, 1931. The improvements, such as they are, on the contract, were completed about the year 1925. The record shows that the appellant saw the property and improvements some time during the latter part of the year 1927, or the beginning of the year 1928. On February 9, 1932, appellant served notice of rescission, claiming as grounds for rescission, fraud and misrepresentation. The action, as stated, was begun the next day.

A witness by the name of H. A. Stoll, a defendant in the action, testified that he took the appellant down to the tract in the latter part of 1927, or the fore part of 1928; that they visited the particular lots in controversy and looked over the tract. At that time the streets were graded, curbs and sidewalks were in; that the streets were paved with four inches of oil and rock road; that the improvements agreed to be made were all in at that time. When Mr. Greenberg went out to the tract the improvements were all made.

A witness by the name of Amelia Jacobson testified that she bought a lot in 1923, and that four years after she bought the lot the sidewalks were in and gravel pavement on the streets. A witness by the name of Austin testified that the work was finished in 1925.

While the testimony of the appellant controverts the testimony of the witness Stoll, the record does show that the appellant himself, in company with a Mr. Chipkin, drove out to the Ambassador Park tract some time during the year 1928, to see what had been done, or what had taken place during the previous years; that he and Chipkin were unable to reach the lots, apparently on account of the condition of the streets. It does not appear that the appellant saw the lots in controversy again until some time later, during the latter part of the year 1931.

Shortly after viewing the lots in 1928, the record shows that the appellant went to New York City and remained there until October, 1931, when he again returned to Los Angeles and visited the Ambassador Park tract where the lots were situated, and found that no change had taken place during the intervening years.

[1] The appellant seeks to avoid the effect of the statute of limitations and

laches by alleging that he did not know that the Du Bain Realty Corporation was not going to further comply with its promises relative to making improvements upon the Ambassador Park tract, until after he returned from New York City in 1931. The fact, however, that the appellant attempted to visit the lots in controversy during the latter part of 1927, or the early part of 1928, and either viewed the lots, as testified to by Mr. Stoll, or was unable to reach the same, as testified to by himself, unquestionably justified the trial court in concluding that there was sufficient visual facts disclosed to constitute discovery of the failure of the Du Bain Realty Corporation to comply with its promises, and to ascertain the facts constituting the fraudulent representations which had been made, and upon which it is alleged that the appellant entered into the contracts of purchase for the two lots.

The court found that the appellant inspected the property purchased by him, before and at the time of entering into the contracts of purchase; that the plaintiff inspected the lots in 1927 and 1928, and learned therefrom, and knew of the street improvements in said tract, and their condition, and materials, and that the same were in the same condition, and the same materials used therein as they were in 1931, and at that time the appellant made no complaint as to the character of the improvements, or the kind and quality of the improvements on said tract, and that the owner of said tract claimed that the kind and quality of the improvements on said tract in 1927, was all of the improvements it was required to, or intended to construct thereon.

[2] The excerpts from the testimony which we have set forth herein, and what we have said shows that the court was amply justified in making such finding. Such being the case, we are precluded from holding that the trial court was in error in coming to the conclusion that the statute of limitations began to run from the latter part of 1927; that there was sufficient, as we have said, to visually cause discovery and place a reasonable person upon inquiry to ascertain all the facts constituting the alleged fraudulent and false misrepresentations.

[3] In the case of *Pourroy v. Gardner*, 122 Cal.App. 521, 10 P.2d 815, we find language which is pertinent here, to-wit (page 819): "Where the circumstances

are such as to put a person of ordinary intelligence and prudence on inquiry, or where there are gross laches in not making any effort to discover the real facts which might have been discovered by the use of slight diligence, the statute of limitations cannot be avoided, and the knowledge which thus might have been obtained is imputed as of the time of the commission of the fraud."

[4,5] While the facts disclosed by the record clearly support the conclusion of the trial court that the appellant's cause of action is barred by the provisions of section 338 of the Code of Civil Procedure, the opinion in the case of *Campbell v. Title Guarantee & Trust Company*, 121 Cal.App. 374, 9 P.2d 264, takes up and discusses many questions which are involved herein, to-wit: The right to rescind under section 1691 of the Civil Code. We do not need to quote from the opinion, but merely refer to it, as the authorities there cited appear to be decisive of the questions presented for our consideration. It is there held that upon the discovery of the fraud, action to rescind must be begun promptly. In the instant case the trial court was correct in finding that the conditions presented by the *Ambassador Park* tract in 1927, and the beginning of 1928, were sufficient to indicate to any reasonable person that the respondents in this action were not going to make any further fulfillment of their promises, whether oral or written, in relation to improving the tract in question. It may be here stated that the formal contracts contained nothing with relation to the improvement of the tract, but were simply contracts of sale and purchase. The promises, whether oral or written, upon which the appellant relied, were outside of the contracts. The physical condition of the tract in 1927 and 1928 was such that the trial court we think was justified in concluding that the basis of discovery was there presented, and was such as to cause any reasonable person to conclude that the promises of the defendants were not going to be fulfilled, and that reasonable inquiry would lead to a full disclosure of the fraudulent misrepresentations. The running of the statute of limitations did not depend upon any demand for performance. It began to run from the time the appellant discovered that the promises of the defendants were not being fulfilled. In support of what we have said we may cite the cases of *Witt-*

man v. Board of Police Commissioners, 19 Cal.App. 229, 125 P. 265; *Lady Washington, etc., Company v. Wood*, 113 Cal. 482, 45 P. 809. See, also, *Johnson v. Ehrgott*, 1 Cal.2d 136, 34 P.2d 144, holding that an action for fraud and deceit must be commenced within three years after the discovery.

In reviewing the record we find no statement of circumstances that would excuse the appellant from not ascertaining all the alleged facts and circumstances constituting the alleged fraudulent promises and misrepresentations made by the respondents. With the physical condition before the eyes of the appellant, showing that the respondents were not improving the tract according to their oral and public promises, the mere fact that the appellant left the state of California shortly thereafter and did not return until some time during the year 1931, certainly justified the trial court in coming to the conclusion that no real excuse had been offered, or reason set forth for not beginning the action earlier, and also for not making reasonable inquiry as to why the respondents had not made the improvements according to their alleged promises.

[6] The question of laches is primarily one for the determination of the trial court, and its conclusions will not be set aside by an appellate court if it finds reasonable support in the evidence. *Kramer v. Associated Almond Growers*, 111 Cal. App. 595, 295 P. 873.

[7] The appellant contends that much of the testimony introduced by the respondents is without any foundation in truth. That, however, was a matter for the determination of the trial court, and if the trial court believed the testimony to which we have referred to herein, showing the discovery, and the opportunity which would have led to a full knowledge of the alleged fraudulent actions of the defendants an appellate court has no authority to set aside such findings and conclusions. It is the province of the trial court to determine the credibility of the witnesses and the weight to be given to their testimony.

[8] It is also contended by the appellant that the statute of limitations, while intended to protect the innocent, is more often used as a shield by the guilty, and that such is the application of the statute in the instant case. If we admit this to

be true, it furnishes no basis for setting aside the actions of the trial court. The statute is binding upon courts, irrespective of the fact that many people take advantage thereof to escape the penalty of their wrongdoing.

The action of the trial court in holding that the appellant's cause is barred by the statute of limitations, finding ample sup-

port in the record, it becomes unnecessary to discuss any of the alleged errors of the court in the trial of the action, as such errors, if admitted, would be, and are wholly immaterial.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

11 Cal.2d 407

VENTURA CO., Inc., v. CRAEMER, Building and Loan Com'r.

L. A. 16580.

Supreme Court of California.

June 10, 1938.

1. Building and loan associations ⇨42(17)

The stockholder's liability created by Constitution and statute providing that each stockholder should be individually liable for his proportionate share of corporate debt was a direct liability of stockholder to creditor, and did not entitle building and loan commissioner engaged in liquidating building and loan association to withhold liquidating dividends owing to assignee of claim as an offset to a possible stockholder's liability of assignor. Civ.Code, § 322; Const. art. 12, § 3.

2. Building and loan associations ⇨2

The statute making stockholders of building and loan associations liable to creditors did not entitle building and loan commissioner engaged in liquidating building and loan association to withhold liquidating dividends owing to claimant as an offset against a possible stockholder's liability, where unpaid obligations of association involved were all incurred prior to effective date of statute. St.1931, p. 483.

3. Building and loan associations ⇨2

The provisions of statute regulating building and loan associations relating to stockholders' liability are not applicable to liability for obligations incurred prior to effective date of statute. St.1931, p. 483.

4. Corporations ⇨225

The constitutional provision and statute providing that stockholders should be individually liable for their proportionate share of corporate debts fixed minimum limit of liability which could be imposed upon stockholders for corporate debts incurred prior to August 14, 1931. Civ.Code, § 322; Const. art. 12, § 3.

5. Building and loan associations ⇨2

The statute authorizing the commission to enforce the liability of holders of capital stock of building and loan association for their respective pro rata of any deficiency in case assets should be insufficient to meet liabilities on liquidation was void because of conflict with constitutional provision relating to a stockholder's liability for debts of corporation. St.1911, p. 611, § 9, as amend-

ed by St.1911, Ex.Sess., p. 7, § 4; Const. art. 12, § 3.

6. Building and loan associations ⇨42(17)

Where there was no stockholder's liability which building and loan commissioner engaged in liquidating building and loan association was authorized to enforce against assignee of claim of stockholder because of fact that the only applicable statute was unconstitutional, commissioner was not entitled to withhold liquidating dividends as an offset against claimant's possible stockholder's liability. St.1911, p. 611, § 9, as amended by St.1911, Ex.Sess., p. 7, § 4.

7. Mandamus ⇨190

The petitioner, in mandamus proceeding to compel building and loan commissioner to pay liquidating dividends due to petitioner and other creditors similarly situated, was not entitled to a percentage of amounts recovered by claimants on whose behalf proceeding was prosecuted as reasonable compensation for attorney's fees and costs, where record did not afford sufficient basis for fixing of such an allowance by reviewing court.

—◆—

In Bank.

Mandamus proceeding by the Ventura Company, Incorporated, for itself and on behalf of all other claimants similarly situated, against Justus F. Craemer, as Building and Loan Commissioner of the State of California, to compel the respondent to pay liquidating dividends allegedly due to the petitioner, as well as claims of all other creditors similarly situated.

Peremptory writ issued.

John C. Campbell and Franz R. Sachse, both of Los Angeles, for petitioner.

Clock, McWhinney & Clock and James C. Ingebretsen, all of Los Angeles, for respondent.

SHENK, Justice.

This proceeding in mandamus was brought to compel respondent State Building and Loan Commissioner to pay liquidating dividends allegedly due to the petitioner, as well as claims of all other creditors similarly situated.

On July 30, 1931, the commissioner took possession of the business, property, and assets of the United Building and Loan Association for the purpose of liquidating its affairs. At that time Emma H. Ingram was the owner of investment certificates

issued by the association and was also the owner of twenty-one shares of its guarantee stock. On March 25, 1932, she filed a creditor's claim with the commissioner for \$6,873.75, the amount of her investment certificates and interest. On August 19, 1932, this claim was approved contingently. It was listed with other claims aggregating \$73,473.01, filed by those who were both investors in and stockholders of the association, in a schedule headed: "III-D-Approved Contingent on Stockholder's Liability", and accompanied by the following explanatory note: "All claims comprising Schedule III-D * * * are approved contingent on the excess, if any, over and above claimant's liability as a holder of guarantee capital stock of the United Building and Loan Association for the respective pro rata of any deficiency of assets of said association as provided by the statutes in such cases made and provided."

On March 28, 1935, by partial mesne assignments, the petitioner Ventura Company acquired a \$2,100 interest in the claim filed by Emma H. Ingram. Thereafter, in the course of liquidation of the association, the commissioner received sufficient funds to pay a fifty per cent dividend to claimants. He paid this dividend in full to holders of approved claims, but retained a portion of the sums due holders of contingently approved claims. He withheld any payment to the latter class which would have the effect of reducing the value of a contingently approved claim below the par value of the guarantee capital stock standing in the name of the claimant during the period in which obligations which have not been paid were incurred by the association. The petitioner, itself never a stockholder, is relegated to that class by the commissioner by virtue of its ownership of a partial interest in the claim of Emma H. Ingram. It challenges the right of the commissioner to withhold dividends as an offset against the liability, if any there be, to which claimant-stockholders may be subjected, if and when such liability shall be established; and it seeks by this proceeding to compel the commissioner to pay the dividend to which it claims to be entitled, as well as the dividends due other claimants similarly situated.

It is our conclusion that the retention of these dividends by the commissioner is unwarranted. There are three possible

alternatives which may be claimed to support the commissioner's contention that the stockholder's liability attaches so as to justify his withholding the dividends as an offset.

[1] First, there is the old stockholder's liability which was declared by section 3, article 12 of the Constitution (repealed November 4, 1930), and section 322 of the Civil Code (repealed August 14, 1931, St. 1931, p. 444). *Kaysser v. McNaughton*, 6 Cal.2d 248, 57 P.2d 927. This was a direct liability of the stockholder to the creditor, which the commissioner was never authorized to enforce. *Williams v. Carver*, 171 Cal. 658, 154 P. 472.

[2,3] Secondly, there is the liability imposed by the present law regulating building and loan associations (Stats.1931, p. 483), which became effective on August 14, 1931, replacing the earlier act (Stats. 1911, p. 607, as amended, Stats.Extra Session 1911, p. 7), and section 634(d) of the Civil Code. The provisions of the 1931 act are not applicable to liability for obligations incurred prior to the date the act came into effect. *Drapeau v. Fullerton Corporation*, 8 Cal.2d 189, 64 P.2d 944. *Rainey v. Michel*, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148. Here admittedly all unpaid obligations of the association were incurred prior to August 14, 1931.

[4,5] This leaves only the question of the applicability of the Act of 1911 (sec. 9). The pertinent provisions of that statute, in our opinion, were violative of section 3, article 12, of the Constitution. The constitutional provision and section 322 of the Civil Code fixed the minimum limit of the liability which could be imposed upon stockholders for corporate debts incurred prior to August 14, 1931. *Wood v. Hamaguchi*, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861; *Rainey v. Michel*, supra, page 284, 57 P.2d 932. The constitutional provision read: "Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." Section 322 of the Civil Code provided: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stock-

holder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. * * *

Section 9 of the Act of 1911, as amended by St. 1911, Ex.Sess., p. 7, § 4, stated: "In every case where any such association * * * shall have a paid in guarantee capital, and the realization of assets shall be insufficient to meet the liabilities due to all other classes of stockholders, shareholders, members and investors, the commission shall enforce, by action or otherwise, the liability of each and every of the holders of the guarantee capital stock for his or their respective pro rata of any such deficiency. * * *

It will be observed that while the constitutional provision drew no distinction between the individual liability of a stockholder in a solvent corporation and one in an insolvent corporation, the 1911 statute would not come into operation until after the commissioner had taken possession of the business and property of an association for purposes of liquidation; also that while the constitutional provision declared only a direct and primary proportionate liability of the stockholder for debts of the corporation, the statute purported to impose a proportionate liability for any *deficiency* existing at the time of final liquidation, thus including a liability for charges of collection as well as for payment of debts. This was clearly a provision for a further, different, and additional liability from that fixed by the Constitution. Thus, as the statute of 1911 was in conflict with the constitutional provision, it was inoperative and void. *Wood v. Hamaguchi*, supra; *Rainey v. Michel*, supra.

[6] It follows that, as there is no stockholder's liability which the commissioner is authorized to enforce against the petitioner for debts of the association incurred prior to August 14, 1931 (and these are the only debts for which possible liability is alleged to exist), the withholding of dividends to which the petitioner may be entitled, as an offset against such

liability, is wrongful. This pronouncement is not meant to imply that if there were a stockholder's liability, the commissioner would have the right to retain dividends for the purpose of applying them against such liability. This question of right of offset need not be determined and we refrain from expressing any views upon it.

[7] The petitioner requests that this court allow it a percentage of the amounts recovered by all the claimants on whose behalf this proceeding was prosecuted as reasonable compensation for its attorneys and to cover the costs which it has incurred herein. This request must be denied. The record herein does not afford a sufficient basis for the fixing of such an allowance by this court.

Let the peremptory writ issue.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.



11 Cal.2d 779

Virgil McCOMBS, for Himself and on Behalf of All Other Claimants Similarly Situated, Petitioner, v. Justus F. CRAEMER, as Building and Loan Commissioner of the State of California, Respondent.

L. A. 16581.

Supreme Court of California.

June 10, 1938.

In Bank.

John C. Campbell and Franz R. Sachse, both of Los Angeles, for petitioner.

Clock, McWhinney & Clock and James C. Ingebretsen, all of Los Angeles, for respondent.

PER CURIAM.

This is a companion case to the case of *Ventura Company, Inc., v. Craemer*, 80 P.2d 720, this day decided. On the authority of that decision, and for the reasons set forth in the opinion filed therein, the petitioner herein is entitled to the writ of mandamus.

Let the peremptory writ issue.

11 Cal.2d 779

Richard SACHSE, for Himself and on Behalf of All Other Claimants Similarly Situated, Petitioner, v. Justus F. CRAEMER, as Building and Loan Commissioner of the State of California, Respondent.

L. A. 16582.

Supreme Court of California.

June 10, 1938.

In Bank.

John C. Campbell and Franz R. Sachse, both of Los Angeles, for petitioner.

Clock, McWhinney & Clock and James C. Ingebretsen, all of Los Angeles, for respondent.

PER CURIAM.

This is a companion case to the case of Ventura Company, Inc., v. Craemer, 80 P.2d 720, this day decided. On the authority of that decision, and for the reasons set forth in the opinion filed therein, the petitioner herein is entitled to the writ of mandamus.

Let the peremptory writ issue.



27 Cal.App.2d 129

YOUNG v. YOUNG HOLDINGS CORPORATION, Limited, et al. (KEELER, Intervener).
Civ. 2148.

District Court of Appeal, Fourth District, California.

June 15, 1938.

1. Judgment ⇨443(1)

A judgment quieting title, obtained through extrinsic fraud, may be attacked in an equitable action brought for that purpose.

2. Judgment ⇨443(1)

Where corporation was organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law, and one of the relatives who became principal stockholder, president and manager of the corporation acquired powers of attorney from the vari-

ous heirs by assuring them that their interests would be thus promoted, a judgment for corporation entered in a quiet title action in which disclaimers were filed on behalf of heirs by attorneys selected by the one relative was not conclusive but was subject to attack for extrinsic fraud in an equitable proceeding for an accounting and reconveyance of property which corporation had acquired by quitclaim from the heirs without consideration.

3. Corporations ⇨1

Relatives of deceased who organized a corporation to acquire property of deceased's estate as part of a plan to defraud the heirs at law were not entitled to retain property which they obtained from the heirs without consideration or to retain proceeds of property disposed of, by cloaking themselves in the garb of the corporation.

4. Trusts ⇨348

A corporation which had been organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law was not entitled to retain the fruits of the fraudulent transaction in which the relatives were guilty of flagrant breaches of trust.

5. Judgment ⇨455

Equity has jurisdiction of actions for relief against fraudulently procured judgments. Code Civ.Proc. § 392; Const. art. 6, § 5.

6. Venue ⇨5(4)

The superior court of Los Angeles county had jurisdiction of an action in which judgments quieting title to land in Los Angeles, Kern and Orange counties were challenged. Code Civ.Proc. § 392.

7. Courts ⇨481

The superior court of one county has equitable jurisdiction of an action challenging a fraudulently procured judgment rendered by the superior court of another county in a quiet title action. Const. art. 6, § 5.

8. Principal and agent ⇨69(1)

An agent may not enter any transaction with property which is the subject matter of the agency, in which transaction he has an individual interest, without a full and fair disclosure to his principal. Civ.Code, § 2322.

9. Principal and agent ⇨69(1)

An agent who has a personal interest in a transaction involving property consti-

tuting the subject matter of the agency is bound to the same standard of integrity and good faith as a trustee. Civ.Code, § 2322.

10. Judgment ⇨461(1)

In action for an accounting and for a reconveyance of property acquired by corporation which had been organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law, where corporation obtained judgment in a quiet title action in which disclaimers were filed on behalf of the heirs by attorneys selected by relatives who had acquired powers of attorney from the various heirs, burden was on relatives who relied on invulnerability of judgment quieting title, to prove fair dealing and knowledge on part of heirs.

11. Judgment ⇨461(1)

A judgment quieting title in corporation which had been organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law was presumptively fraudulent as to an heir without notice, in absence of evidence of fair dealing.

12. Appeal and error ⇨1071(6)

In action for a reconveyance of land obtained through fraud and for an accounting, where defendants had burden of producing evidence of notice and good faith, they could not complain of the lack of a finding of fraud which of necessity must have been found against them.

13. Courts ⇨481

The court is reluctant to set aside a final judgment of another court of equal jurisdiction unless extrinsic fraud is proven, but in such case will not hesitate to set the judgment aside.

14. Trusts ⇨371(2)

In an action for reconveyance of land which had been acquired by defendants through fraud and for an accounting, where the complaint alleged facts showing a conspiracy constituting fraud and deceit in acquisition of the property, title in which had been quieted in a corporation organized by the defendants for the purpose of acquiring the property, complaint was sufficient though failing to directly allege that the plaintiff had had a defense to the quiet title action on the merits.

15. Appeal and error ⇨1170(10)

A judgment relieving plaintiff from the defendants' trickery, fraud, deceit and

breach of trust will not be reversed for alleged lack of evidence to support it, except for grievous error of law. Const. art. 6, § 4½.

16. Deeds ⇨70(1)

A deed which is obtained through the conspiracy and fraud of those who benefit therefrom may be invalidated by a court of equity at the instance of the defrauded grantor.

17. Trusts ⇨347

An heir at law who had been fraudulently induced to convey her interest in deceased's estate to a corporation which had been organized by relatives of deceased to acquire property of the estate as part of a plan to defraud all the heirs at law was entitled to equitable relief, though the deed by which she conveyed her property to the corporation was voluntarily executed.

18. Trusts ⇨362

Where corporation had been organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law, the corporation's avowed objective as stated in the by-laws of carrying out decedent's desire to help the American Indians furnished no basis for defense to action by heir to recover property or proceeds, of which she had been defrauded.

19. Equity ⇨65(1)

A party coming into equity must come with clean hands.

20. Fraudulent conveyances ⇨174(1)

A plaintiff who is a party to an act which is done to defraud her creditors will be denied equitable relief.

21. Fraudulent conveyances ⇨172(3)

A grantee who has fraudulently induced his grantor to convey to him property to defraud the grantor's creditors cannot hide behind the act which was induced by his own initial fraud as defense to grantor's equitable action for relief.

22. Fraudulent conveyances ⇨172(3)

An heir who had been fraudulently induced to convey property to a corporation which had been organized by relatives of deceased to acquire property of deceased's estate as part of a plan to defraud the heirs at law was entitled to a reconveyance notwithstanding virtual admission by letter that conveyances were executed to defraud her creditors.

23. Trusts Ⓒ361

The heirs at law of an estate who had been fraudulently induced to convey property acquired from the estate to a corporation organized by relatives of deceased to acquire property of the estate as part of a plan to defraud all the heirs at law were not required to repay to the relatives money spent on the affairs of the corporation before being entitled to reconveyances and an accounting.

24. Trusts Ⓒ289

A trustee must account to his beneficiary for the use of trust funds.

25. Trusts Ⓒ372(1)

In action for a reconveyance of property conveyed by the heirs at law of an estate to a corporation organized by relatives of deceased to acquire property of the estate as part of a plan to defraud the heirs, relatives who sought to forestall relief until reimbursed for alleged expenditures on behalf of the corporation had burden of proving the expenditures.

26. Appeal and error Ⓒ994(3), 1012(1)

A trial judge, sitting without a jury, is the sole and exclusive judge of the credibility of the witnesses and the weight and sufficiency of their evidence.

27. Appeal and error Ⓒ1008(1)

In action for a reconveyance of property conveyed by heirs at law to corporation organized by relatives of deceased to acquire property of his estate as part of a plan to defraud the heirs, whether relatives who sought to forestall relief until reimbursed for expenditures allegedly made in the affairs of the corporation were unable to prove such expenditures because of destruction of books and records in a flood was for the trial court sitting without a jury.

28. Trusts Ⓒ362

In action for a reconveyance of property conveyed by heirs at law of an estate to a corporation organized by relatives of deceased to acquire property of his estate as part of a plan to defraud the heirs, and for an accounting, relatives were not entitled to offset alleged personal loans to one of the heirs who later died but remedy was by claim presented to that heir's executor or administrator.

29. Charities Ⓒ1
Trusts Ⓒ95

The fraudulent acquisition of property by a corporation which had been organized

by relatives of deceased to acquire property of his estate as part of a plan to defraud the heirs at law, although corporation was organized for the avowed purpose as stated in its by-laws of effectuating the decedent's desire to aid the American Indians, created an "involuntary trust" for the benefit of the heirs, rather than a "charitable trust." Civ.Code, §§ 2215, 2217, 2223, 2224.

[Ed. Note.—For other definitions of "Charitable Trust" and "Involuntary Trust," see Words & Phrases.]

30. Limitation of actions Ⓒ100(3)

An action for reconveyance of property which heirs at law of deceased had been fraudulently induced to convey to a corporation organized for that purpose by deceased's relatives as part of a plan to defraud the heirs, and for an accounting, brought within three years after discovery of the fraud, was not barred by limitation.

31. Appeal and error Ⓒ910

Where a plea of limitation has been interposed, a record of appeal that does not contain the date of filing of original pleading and contains only a third amended complaint is defective and requires that the Court of Appeal presume that action was commenced in time.

32. Appeal and error Ⓒ1071(3)

The alleged insufficiency of the evidence to support certain of the trial court's findings will not warrant a reversal if the findings which are supported by the evidence are sufficient to sustain the judgment.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Cora B. Young against the Young Holdings Corporation, Limited, and others to compel a reconveyance, for an accounting, to quiet title, for appointment of a receiver, for interest on moneys allegedly due plaintiff, and for general relief, wherein Alpha Alpheus Mosher, as executor of the estate of Henry J. Young, deceased, intervened, and for whom, pending appeal, P. E. Keeler, as special administrator of the estate of Henry J. Young, deceased, was substituted. Judgment in favor of plaintiff and intervener, and defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

James W. Bell and P. E. Keeler, both of Los Angeles, for respondents.

MARKS, Justice.

Plaintiff brought this action against defendants seeking a decree (1) compelling defendants to reconvey to her certain described properties of her own estate in the California counties of Los Angeles and Orange and in the state of Oklahoma, and certain described properties or interests therein formerly belonging to the estate of Charles Sumner Young, deceased, in the county of Kern in California; (2) requiring defendants to account to her for moneys received from property formerly belonging to the estate of Charles Sumner Young, and her own properties; (3) quieting title to the real properties or her interest therein; (4) appointing a receiver to collect rents and profits from the real estate; (5) for interest on moneys due her; (6) for general relief.

The complaint in intervention sought practically the same relief as did the third amended complaint, except that it was confined to properties formerly belonging to the estate of Charles Sumner Young, deceased. Pending this appeal, P. E. Keeler, as special administrator of the estate of Henry J. Young, was substituted in the place and stead of Alpha Alpheus Mosher as the executor of the estate of Henry J. Young, deceased.

After a protracted trial the trial court found that defendants had conspired together to defraud, and had defrauded, plaintiff and intervenor out of the Kern county property, and had conspired to defraud, and had defrauded, plaintiff out of her properties in Los Angeles county, Orange county and in the state of Oklahoma. It was adjudged that defendants held a 21 and $\frac{1}{15}$ per cent interest in the Kern county property and all the other property in trust for plaintiff, and an 18 and $\frac{1}{15}$ per cent interest in the Kern county property in trust for the estate or heirs or devisees of Henry J. Young. Defendants were ordered to reconvey the respective interests of plaintiff and intervenor to them and their interests therein were quieted. A money judgment was rendered in favor of plaintiff in the sum of \$13,809.95, and in favor of intervenor in the sum of \$11,895.15. Defendants have appealed from the whole of the judgment.

We find no reference in the briefs to the portion of the judgment dealing with the Oklahoma property of plaintiff. We there-

fore conclude that defendants have abandoned this portion of their appeal and we will give it no further attention.

The case is before us on a bill of exceptions containing eight hundred fifty-six pages. The voluminous record deals with events beginning in 1925 and ending at the time of the trial in 1936. We cannot review all of the evidence in detail within the limits of this opinion. As the trial court accepted the evidence presented by plaintiff and intervenor as true, we will confine our statement of facts to as brief a review as possible of those portions of the evidence supporting the findings and judgment. The statement of facts naturally divides itself into two parts, the one dealing with the Kern county property formerly belonging to Charles Sumner Young, and the other, dealing with the properties in the counties of Orange and Los Angeles, belonging to plaintiff. It should be observed, however, that the truth of many of the facts which we will state as proved, together with many of the inferences and conclusions the trial judge drew from them, are disputed by the defendants.

Charles Sumner Young died in September, 1925, leaving surviving him as heirs at law, Henry J. Young, his brother, since deceased; Alice L. Fisher, his sister, since deceased; Jessie Fremont Young, his sister, since deceased, and plaintiff, Cora B. Young, his sister. He left a will, which, after bequeathing relatively small sums to his brother and three sisters, left the major portion of his estate to the Clara Barton Sequoyah Foundation, a charitable corporation which had as its avowed purpose, assistance to and relief of the American Indian. As the will was executed less than thirty days prior to the death of the testator the bequest to charity failed. We will refer to the corporation as the Foundation.

The estate of Charles Sumner Young consisted of over fourteen hundred acres of land in Kern county. After his death oil was developed on part of it and much of the balance is prospective oil-bearing land so the estate has become very valuable.

Various negotiations were carried on between the Foundation and the heirs at law. These are not particularly important here except to show that plaintiff, and at least one of the other heirs, were much interested in the purpose of aiding the American Indian, expressed in the will of Charles Sumner Young, and were willing to give up large portions of their inheritances to accomplish

this purpose. After the will was admitted to probate, part of the Kern county property was leased to the General Petroleum Corporation for development for oil production. A large bonus was paid in cash and substantial royalties were to be paid out of production. A partial distribution was had of the sum of \$120,000. By various conveyances the property of the estate finally found its way into a trust with the Security Trust Company of Bakersfield as trustee and the brother and three sisters and their assignees as beneficiaries.

Defendants James D. Young, Georgia Lee Young, his mother, Mildred Hanna and William E. Hanna, her husband, were relatives of the deceased, either by blood or by marriage, but not heirs at law. A. C. Routhe, named in the title as A. G. Routhe, an attorney at law, was at different times, and in other litigation, attorney for the various parties to this action, even when their interests were conflicting. The Young Holdings Corporation, Ltd., was a corporation organized by the individual defendants for the purpose of taking title to the property of the estate of Charles Sumner Young, deceased.

The evidence shows that James D. Young, Georgia Lee Young, Mildred Hanna and William E. Hanna appeared in the estate picture in 1929. On April 20th of that year Georgia Lee Young (the mother of James D. Young) wrote a bank in Bakersfield advising it to pay no more of the estate money to the Foundation.

On May 15, 1929, Alice L. Fisher executed a power of attorney to James D. Young authorizing him to act for her in protecting her interest in the estate of her brother, Charles Sumner Young. In May, 1929, James D. Young went to Los Angeles and contacted plaintiff and discussed with her the advisability of recovering her interest in the estate of her brother. His solicitations and protestations of family affection resulted in plaintiff executing a power of attorney dated June 7, 1929, authorizing him to act for her in the estate matter. Again, at the solicitation of James D. Young, plaintiff assigned to him two-fifths of her interest in the undistributed property of the estate in consideration for his services in recovering her interest for her. He agreed to employ and pay attorneys to represent her. He also secured a similar power of attorney and assignment of interest from Henry J. Young under date of July 26, 1929.

On June 14, 1929, Alice L. Fisher assigned a two-fifths part of her interest in the estate of her brother, Charles Sumner Young, to James D. Young, who agreed to pay all attorneys' fees and court costs in connection with the recovery of her interest in the estate. Jessie Fremont Young executed a similar contract.

During these negotiations, plaintiff, and perhaps some of the other heirs at law of Charles Sumner Young, strongly expressed a desire to carry out the intentions of the deceased to have the larger part of his estate used for the aid of the American Indian. The defendant relatives seemed to have concurred in this desire and promised to carry it into effect, and in addition to protestations of affection, used this as one of the means of securing the documents we have mentioned. In execution of these plans James D. Young prepared a letter, addressed to the trustees of the Foundation, which was signed by plaintiff. This letter was dated October 23, 1929, and contained the following:

"This communication will be brought to you by members of the Young family, in whom both you and myself as well as the other heirs of Charles Sumner Young should have the utmost confidence. They will convey to you my attitude toward and plans for the Foundation, and the carrying out of these plans will be largely left in their hands, under my supervision, with the assent of my brother and sister.

"It must be borne in mind, however, that any plans for the Foundation which are now contemplated by us are dependent for their success upon the attitude of the Foundation itself at this time, and for this reason the full cooperation of the Foundation must be had, as will be explained by the bearer of this message. * * *

On November 8, 1929, the Foundation conveyed all of its interest in the estate to the heirs of Charles Sumner Young. On December 9, 1929, James D. Young, acting under the several powers of attorney, without consideration, conveyed the interests of plaintiff, of Henry J. Young, and of Alice L. Fisher in the estate property to defendant Georgia Lee Young, his mother. In the meantime Jessie Fremont Young had died. James D. Young filed her will for probate in the superior court of Kern county. Letters of administration with the will annexed were issued to him on April 7, 1930.

On April 14, 1930, a decree of final distribution was made in the Estate of Charles Sumner Young, deceased, distributing all of the property of the estate to the Bank of America, successor of the Security Trust Company of Bakersfield, the trustee we have already mentioned.

At a date not definitely fixed, James D. Young engaged A. C. Routhe to act as attorney for plaintiff in the estate and other matters, supplanting A. G. Reily who had been acting as attorney for her.

On March 27, 1930, James D. Young secured a second power of attorney from Alice L. Fisher and her husband. This instrument gave him broad powers in dealing with the property of the estate of Charles Sumner Young and was by its terms declared to be irrevocable.

On April 25, 1930, James D. Young borrowed three thousand dollars from plaintiff. Young gave plaintiff the following instrument:

"Los Angeles, California, April 25th, 1930.
"Miss Cora B. Young, Los Angeles, Calif.

"This is to acknowledge the receipt of \$3,000.00 this day handed to me for general use incident to the formation of the Young Holdings Corporation (to be incorporated), and which above sum it is understood and agreed is to be later returned to you from the funds of said corporation; and this is to acknowledge our agreement that the above sum constitutes a loan and is to be repaid to you, as aforesaid.

"After organization, should you so request, this loan will be evidenced by note of the corporation.

"James D. Young
"Agent for Cora B. Young."

So far as we are advised, no note was given for this loan, and it remains unpaid.

Under date of May 2, 1930, A. C. Routhe wrote plaintiff a rather indefinite letter concerning "our business enterprise" in which he stated, "I have in mind, and will desire later to discuss with you, a plan for your protection against possible loss, or adversities."

On May 16, 1930, James D. Young obtained from plaintiff a general power of attorney, not confined to dealing with the property of the estate of Charles Sumner Young, deceased. This document was witnessed by A. C. Routhe.

On June 1, 1930, James D. Young wrote plaintiff a letter, in part, as follows:

"Dear Cousin Cora:

"Just a line to let you know we arrived here in fair shape and are once again at the task.

"We had a splendid talk with Mr. Dawson in his home which happens to be his office also.

"Stopped of course at the Foundation and many other places where we gained much information which will be of great benefit to us later on.

"So much to tell you and talk over upon our return.

"It looks very much to us like a plan was in the making, which will be of great interest and satisfaction to all. * * *

"Mighty glad that things in general are in good shape to continue on with our plans.

"Do not see how it would be possible to stop us now with your good help and our future outlook.

"I wish to take this opportunity to again thank you for the many splendid things you have done and to assure you again, that it is my intention and our desire, to follow thru to a successful conclusion. * * *

"With loads of love and best wishes from all of us always,

"Jim.

"P. S. The Routhes are sure fine people and square to a fault."

Under date of July 22, 1930, James D. Young wrote to plaintiff, in part, as follows:

"Dear Cousin Cora:

"* * * Since you have been away from us, I have thot much of the confidence you placed in me and have many times wondered at it and attempted to justify if I could, your evident trust in me.

"I consider that you accorded me an honor that few men or women could boast of and it is my intention to stay within the limits of that trust and protect you, while you are not here to do so yourself.

"Do not intend to burden you with business while you are on a vacation period with this exception—the property is in good shape and you have nothing to worry about nor to disturb you in any way.

"Cousin Alice is at Lakeside and well, Cousin Henry is feeling as well as usual and Mother and our family are all well now although we have all been somewhat under the weather.

"Would appreciate a note from you from some point along the way. Have a good

time and take care of your health. Best of wishes always,
"With Love,

"Jim."

The foregoing letters are quoted as examples of protestations of love and affection and assurances of good faith made by the related individual defendants whereby they gained and retained the trust and confidence of plaintiff while they were despoiling her of all of her property.

In the meantime the Young Holdings Corporation, Ltd., a Nevada corporation, had been organized. As far as we can ascertain, none of the heirs at law of Charles Sumner Young were given any interest in this corporation. James D. Young was the president and manager of the corporation, and its principal stockholder.

Under date of September 21, 1931, Henry J. Young quitclaimed his interest in the estate of Charles Sumner Young to the corporation. Under date of September 28, 1931, Cora B. Young executed a similar quitclaim deed to her interest in the estate property. This deed was witnessed by James D. Young and was not acknowledged until April 8, 1932. On January 20, 1931, Georgia Lee Young had conveyed the same property to the corporation.

Defendant William E. Hanna testified concerning the arrangements with some of the heirs of Charles Sumner Young and their purposes, as follows:

"I had an agreement with Cora B. Young and Alice Fisher, it was a verbal agreement that I was to spend my own money. We would organize a corporation and we were to bring the interests of the Charles Sumner Young estate together and we were to use the profits of that corporation to carry out the will and the wishes of Charles Sumner Young as directed by Cora Young and Alice Fisher from time to time. I did not have that kind of agreement with Alice Fisher when I left Toledo. It was about the time we formed the Young Holdings Corporation that we had such an agreement. That agreement was then oral and with Cora B. Young and with Henry Young. I think there was some agreement in writing. That is my memory that there was; Mr. Blackburn, as attorney, took care of it. Mr. Blackburn was my attorney—he was not my attorney, he was attorney for the Foundation and I was attorney, in fact, for them. I think Mr. Blackburn appeared for all the heirs and the representatives of the heirs in the quiet title suit, and the Founda-

tion. He was employed by James D. Young only on behalf of Alice Fisher and E. K. Fisher and myself. I employed him to represent the Foundation. My authority was that I had power of attorney from the Clara Barton Sequoyah Foundation; I have it with me. Mr. Blackburn represented Cora B. Young. I never had any agreement with Jessie Fremont Young for any interest. I had no agreement with Jim Young.

"Q. Then none of your group, yourself, your wife, Georgia Lee Young or James D. Young ever had any agreement or assignment from Jessie Fremont Young? A. They had one-half of her interest; a little over one-half of her interest; she was dead at that time."

In June, 1931, the Young Holdings Corporation, Ltd., and various other plaintiffs who had interests in the Kern county property formerly belonging to the estate of Charles Sumner Young, filed an action to quiet title to this property against the Bank of America National Trust and Savings Association, a corporation; the trustees under the will of Jessie Fremont Young, deceased; James D. Young as administrator with the will annexed of the estate of Jessie Fremont Young, deceased; the Clara Barton Sequoyah Foundation; James D. Young and Dorothy Young, his wife; Alice L. Fisher, Cora B. Young and Henry J. Young, as heirs at law of Jessie Fremont Young, deceased; Cora B. Young; Henry J. Young; Alice L. Fisher and E. K. Fisher, her husband; Georgia Lee Young; A. G. Reily and Florence A. Reily, his wife; and others. A. C. Routhe was attorney for the plaintiffs. The judgment quieting plaintiffs' title to the property is dated January 5, 1932.

According to the testimony of A. C. Routhe he became attorney for Cora B. Young some time prior to May 27, 1932, certainly in the latter part of 1931. One of his letters indicates he was advising her as early as May 2, 1930. In a letter discussing the bringing of the quiet title action, and written before it was filed, Routhe stated he was then the attorney for Cora B. Young. If he was not her attorney when the quiet title action (in which he was attorney for the plaintiffs) was instituted against her in June, 1931, he was her attorney when judgment was rendered against her in January, 1932.

James D. Young, under his powers of attorney, engaged attorneys to appear in

the quiet title action for Alice L. Fisher, Cora B. Young and Henry J. Young. He also engaged an attorney to appear for Alice L. Fisher as trustee under the will of Jessie Fremont Young, deceased. He instructed the attorney he engaged to file disclaimers for these defendants. At that time, and prior thereto, the same James D. Young was the president, general manager and principal stockholder of the Young Holdings Corporation, Ltd., the principal plaintiff in the action.

About May 16, 1932, the Young Holdings Corporation, Ltd., sold and conveyed its fifty-six and one-third per cent interest in certain of the lands in Kern county, upon which were numerous producing oil wells, to the L. & B. Producing & Drilling Company for \$35,000. Almost immediately after this money was received, a large portion of it was disbursed as follows: \$10,000 to Mildred Hanna; \$10,000 to James D. Young; \$8,000 to Georgia Lee Young; \$5,000 to A. C. Routhe and \$500 to Mr. Blackburn. There was no pretense of paying this money out as dividends. Defendants, through the corporation, had gained the record title to very valuable oil lands and the needs of the noble Red Man had passed from their minds. They did not permit even one American Indian to cast lots with them for the garments. The heirs of Charles Sumner Young did not know that the money which had been a part of their inheritance had been received or was being divided.

Further facts concerning the dealings of defendants with the heirs, concerning the Kern county property, will be set forth, when necessary, in the consideration of the various grounds for reversal urged by defendants. We will, therefore, leave this story of chicanery for the tale of fraud and deceit by which plaintiff was tricked and defrauded out of her own property in Los Angeles and Orange counties.

On November 26, 1930, Cora B. Young, by James D. Young, her attorney in fact, without any consideration, conveyed her Los Angeles county property to the Young Holdings Corporation, Ltd. This deed was recorded on May 6, 1932. On November 26, 1930, Cora B. Young, by James D. Young, her attorney in fact, without any consideration, conveyed her Orange county property to the same corporation. The copy of this deed in the record bears no evidence of its recordation.

As we have already observed, plaintiff at one time engaged A. G. Reily, attorney at law, to care for her interests in the estate of her deceased brother. After the defendant relatives appeared in the picture Reily was discharged and A. C. Routhe was engaged to act for her. Reily made demand on plaintiff for attorney's fees which he had earned prior to his discharge. As these fees were not paid he subsequently brought suit against her to collect them.

Early in 1932, plaintiff received a written demand for payment from Reily. She was alarmed over this development and consulted William E. Hanna about the matter. A few days later Hanna and James D. Young appeared with two quitclaim deeds and a letter, the last of which at least was prepared by her attorney, A. C. Routhe. The deeds quitclaimed her Los Angeles county and Orange county properties to the Young Holdings Corporation, Ltd. The letter prepared by her attorney, presented by her loving relatives, one of whom was her trusted attorney in fact, and at the same time president and general manager of, and principal stockholder in the grantee named in the deeds, deserves quotation in full because of the construction put upon it by defendants and their efforts to hide behind it. It is as follows:

"Los Angeles, California.

"April 19th, 1932.

"J. D. Young,

"404 Western Mutual Life Bldg.,

"321 West 3rd Street

"Los Angeles, California

"My dear Sir:

"I have on various occasions, been threatened with suit and actions which would necessarily involve and encumber my various properties, and otherwise jeopardize my business activities, and for the purpose of avoiding the same, and placing my properties beyond the reach of such demands, and in furtherance of, and compliance with our mutual understandings and agreements concerning the same, I am herewith handing you Quit Claim Deeds to my various properties which are conveyed to the Young Holdings Corporation, Ltd., a corporation, which deeds are a confirmation of former conveyances made of the same.

"It is my understanding that the said company, in the taking of said conveyances, are to take care of the encumbrances, taxes, etc., and to help me personally, financially, from time to time, from the returns thereof,

and that at any time I shall need or require any specific lot or parcel thereof, for my personal use, while the same is held in the name of said company, that it will be re-conveyed to me or to my order, subject to any encumbrance, tax, or charges against the same.

"You are hereby instructed, in case of suit, or action, or other claim or demands against me or my properties, to represent, claim and assert that the said properties are the properties of The Young Holdings Corporation, Ltd., and that I have, or claim, no interest therein. In all these matters I have entrusted my affairs to your care and management and I am thus advising you of my transactions with the said company for your personal information, and for my records and protection I will ask you to please note hereon your receipt, acceptance and understanding thereof.

"Respectfully yours,

"Cora B. Young.

"I am in receipt of the original of the above and I am informed of your wishes and desires and will endeavor to carry out the said plan.

"J. D. Young"

Miss Young signed and acknowledged the deeds and also signed the letter.

There followed a systematic and continued campaign of fear, instilled into the mind of plaintiff by all of the individual defendants; fear of losing all her property as a result of the Reily suit; fear of criminal prosecution. She was told that both results might be avoided if she stayed away from Los Angeles. Many letters written in the course of this campaign are in the record. There is much testimony concerning it. While the letters were clearly written for the purpose of alarming plaintiff and causing her to stay away from her home in Los Angeles, they also contained messages of affection and assurances that her interests were being cared for faithfully by her loving relatives, by her faithful attorney in fact, and her attorney at law. For illustration we quote from two of these letters. The first, written, probably in June, 1933, is as follows:

"Dear Corrine:

"Fear you have been a bit unsettled from reading your last note.

"*You have nothing on us*, for if ever there was a vicious person lived—it's Reily's new counsel; no manners—and if he does half what he says he will do to you and all!

"Your good name, you have enjoyed won't be *worth a nickel* when he sees you. He is just the type to care little about anything; the kind that will laugh you in the face when speaking of *you* and your *high ideals*, and your culture; says he will put you in jail as soon as he can locate you etc. and you can believe me when I say, he is of the *dirty* kind.

"I have never met such a person before, just what you would expect from Reily. Then with old Jew Kline it is one wonderful set up; a pretty *good one* to be away from—and so far to have things still in *your hands* with out losing so much as a *thin dime*!

"It's worth thinking about—and being thankful about.

"I know you are lonely and we all think much about it, but on the other hand you are going and seeing things (even to the big fighters etc)

"(*Watch your step*) and much of your life, dear, has been spent in that way. You, as hard as it will be to see it, have been as sure as the world-blessed. All about you and us, have people *lost there all*—health, sight, hearing, are yours today.—Let us all make the best of it. Yes you are game, and I salute you but the fight isn't over—

"Now my sincere love to you—enjoy hearing from you, and know you have enjoyed your visits to the various colleges for that is your life. Be good Cheerup—and love to you

"Mildred."

The other letter was written by William E. Hanna in July, 1933, and contains the following:

"Dear Cousin Cora:

"* * * Sometimes after reading your letters I think the best thing for you to do is come back; face the music alone and find out just what it all amounts to. It seems impossible to satisfy you, and no amount of sacrifice on our part can seem to allay your feelings.

"Mr. Donohue, Reily's attorney says he will have you back if he can locate, (and says he is tracing you) and will send you over 'for transferring property to avoid creditors,—falsifying income tax returns, fraud, etc' As I have repeatedly told you we are taking care of matters here and will beat them all *if* that is what you want, but if that is *not* what you want and you believe you are taken advantage of etc.—then let us know enough in advance so we can prepare

to *get out* as soon as you return, and you *come back* and face the music yourself.
* * *

"I know at times things seem discouraging to you, and you are alone. But enjoy the fine health you have, spend for the things you enjoy; go to Europe, if that is your desire, and *live*, for;—if you so desire we *will* carry on and better times are ahead. But if you *want* to come back and stand alone just let us know. I know all want *you* to do *only* what you will be *happy* in doing.

"Love,

"Bill."

As a result of this campaign, plaintiff stayed away from her home on several occasions, and on some of them for considerable periods of time. She was absent when the L. & B. Producing & Drilling Company sale was made and the money distributed. It is urged that this campaign of fear was waged by defendants to make plaintiff's dependence on them more absolute and to keep her away from her home and friends so that she would not learn of their faithlessness and duplicity.

Reference to a single instance of the methods used by defendants should not be out of place here. Plaintiff had planned a vacation to start during the latter part of February, 1933. On February 16, 1933, a male voice addressed her over the telephone saying: "I am the foreman of the Grand Jury.
* * * I would like to make an engagement to meet you tomorrow. I suppose you are a very busy woman, but I would like to have a chance to talk with you tomorrow." Plaintiff was alarmed and excited and telephoned A. C. Routhe, telling him of the receipt of this message. He told her that James D. Young would call on her the next morning. At about nine-thirty o'clock the next morning William E. Hanna called at her home with an automobile. Plaintiff described his arrival as follows: "He grabbed up my grips and said, 'You are going away tonight', and we left the house without my paying my hotel bill." Hanna took plaintiff to several places in Los Angeles, Pasadena and Eagle Rock during that day, staying only a short time at each and finally put her on a train leaving Los Angeles that evening. She was gone about fifteen months. During her absence a deed of trust was foreclosed on one of her properties which she had deeded to the Young Holdings Corporation, Ltd.

Defendants compromised the Reily suit for \$10,000. In settlement of this sum they

deeded him two of plaintiff's lots in Los Angeles county and took an assignment to the Young Holdings Corporation, Ltd., of the \$10,000 judgment against plaintiff. From the proceedings on motion for new trial we may conclude that the Young Holdings Corporation, Ltd., had execution issued on this assigned judgment and attempted to levy on plaintiff's property in 1936 after the judgment was entered in her favor in the instant case. We should add that there is no intimation in the record of any misconduct on the part of A. G. Reily.

In September, 1933, and during the absence of Cora B. Young, the Young Holdings Corporation, Ltd., brought suit in the Superior Court of Los Angeles county against Cora B. Young and A. G. Reily to quiet title to her Orange county and Los Angeles county properties. Cora B. Young appeared by a disclaimer which was verified by James D. Young as her attorney in fact. James D. Young also engaged an attorney to file it for her. We are informed that A. C. Routhe was the attorney for the Young Holdings Corporation, Ltd., the plaintiff, of which James D. Young was the principal stockholder, president and manager. Judgment for the plaintiff was entered in September, 1933.

Defendants first urge that the judgments in the two quiet title actions wherein the titles to the properties in question here were quieted in the Young Holdings Corporation, Ltd., are final and conclusive and a bar to recovery by the plaintiff and the intervener here.

The trial court found that defendants conspired together to defraud the heirs of Charles Sumner Young out of their interests in the estate properties, and to defraud Cora B. Young out of her other property. Many fraudulent acts were found of which we have indicated a number. The evidence supporting the findings of conspiracy and fraud is overwhelming. The two quiet title actions were steps in the conspiracy and were only two of the many acts of fraud by which defendants accomplished their purpose.

[1,2] The conduct of defendants in the two quiet title actions amounted to extrinsic fraud. *Jeffords v. Young*, 98 Cal.App. 400, 277 P. 163; *Clavey v. Loney*, 80 Cal.App. 20, 251 P. 232; *Baker v. Baker*, 217 Cal. 216, 18 P.2d 61; *Ringwalt v. Bank of America, etc., Ass'n*, 3 Cal.2d 680, 45 P.2d 967.

The heirs at law of Charles Sumner Young were never really represented in the

quiet title actions. Their attorneys were chosen by James D. Young, one of the conspirators, the moving spirit in the fraud who was their attorney in fact and the one who principally benefited by the judgments in favor of the Young Holdings Corporation, Ltd. A judgment obtained in such an action, through extrinsic fraud, may be attacked in an equitable action brought for that purpose. *Estudillo v. Security Loan, etc., Co.*, 149 Cal. 556, 87 P. 19; *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317; *Parson v. Weis*, 144 Cal. 410, 419, 77 P. 1007.

[3, 4] The Young Holdings Corporation, Ltd., obtained the property without consideration. The individual defendants who committed the fraud could not cloak "themselves in the garb of a corporation" and through it retain the benefits of their fraud. *Raynor v. Mintzer*, 67 Cal. 159, 7 P. 431. The individual defendants were all engaged in the fraudulent transaction and all of them benefited by it. As they violated every rule of good morals, good faith and equity in dealing with their victims neither they nor their corporation can retain the fruits of their wrongdoing, which fruits were gained by a series of acts amounting to repeated and flagrant breaches of trust. *Smith v. Goethe*, 147 Cal. 725, 82 P. 384; *Tomblin v. Hill*, 206 Cal. 689, 275 P. 941; *Rosemead Co. v. Shipley Co.*, 207 Cal. 414, 278 P. 1038.

Defendants next urge that a judgment rendered in one county cannot be invalidated in another county. This argument must of necessity be confined to that portion of the judgment which deals with the Kern county property, title to which was quieted by the Kern county superior court. Title to the balance of the property was quieted by the Los Angeles county superior court, where the instant action was tried and judgment entered.

The principal purpose of this action is to establish that defendants gained title to the property in question through fraud and deceit; that they hold the property in trust for the plaintiff and the intervener; to compel defendants to execute the trust by reconveyance of the property to its rightful owners.

[5] The argument that this action should have been commenced in Kern county is answered by the provisions of section 392 of the Code of Civil Procedure, *Herd v. Tuohy*, 133 Cal. 55, 65 P. 139, and *Kimball v. Tripp*, 136 Cal. 631, 69 P. 428. In the *Herd* Case it was said (page 140): "As to the jurisdiction of the court, there can

be no serious question. The superior court is vested by the constitution (article 6, § 5) with jurisdiction over 'all cases in equity'; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. *Freem. Judgm.* § 484a; *Daniell's Ch.Prac.* 1584, 1585. Nor—with an exception to be noted presently—in this jurisdiction vested in any particular superior court or courts. Every superior court—with the exception alluded to—has jurisdiction of all equity cases that may be brought in it."

The exception noted is contained in section 392 of the Code of Civil Procedure. This section requires actions to quiet title to real property to be commenced in the county in which the property or any part of it is situated.

In the *Kimball* Case the Supreme Court said (page 429): "As to the question of jurisdiction, assuming, without deciding, that the provisions of the Code and of the constitution cited apply to cases of this kind, yet under them the action may be brought in any county in which part of the land affected by the action is situated. *Const.*, art. 6, § 5; *Code Civ.Proc.*, §§ 78, 392."

[6, 7] In the instant case the property involved was situated in Los Angeles, Kern and Orange counties. This fact gave the superior court of Los Angeles county jurisdiction of the action under the clear provisions of section 392 of the Code of Civil Procedure, if that section be considered applicable to the case at bar. If not, then the superior court of Los Angeles County had jurisdiction under its constitutional equity powers.

[8, 9] Defendants next urge that if it be assumed that, due to the findings of fraud and lack of notice, the judgment in the Kern county quiet title action is not binding on plaintiff and on intervener, it must be allowed to stand against the successors in interest of Alice L. Fisher because there is no finding that she was without notice of the fraud.

As we have already observed, James D. Young was attorney in fact for Alice L. Fisher, at the time the Kern county quiet title action was instituted and the judgment rendered, and also at the time he, as such attorney in fact, conveyed her interest in this property to his mother. As he was the principal stockholder of the Young Holdings Corporation, Ltd., he was the principal beneficiary of the judgment favorable to

that corporation. He engaged an attorney to represent Alice L. Fisher and instructed him to file a disclaimer for her.

An agent is prohibited from entering upon any transaction with the property which is the subject-matter of the agency, in which transaction he has an individual interest, without a full and fair disclosure to his principal. California National Supply Co. v. Black, 48 Cal.App. 122, 191 P. 715. In acting for his principal he is bound to the same standard of integrity and good faith as is a trustee. Sec. 2322, Civ.Code; Williams v. Lockwood, 175 Cal. 598, 166 P. 587. In Curry v. King, 6 Cal.App. 568, 92 P. 662, it was said (page 665): "The relation of the plaintiff to the defendant, as well established by the facts and assumed by him throughout the transaction, was that of an agent, and consequently fiduciary in its nature. He was, as her agent, charged in full measure with the duty of good faith in his dealings with her touching the subject-matter of his authority as such agent. The proposition here stated is so well and conclusively settled that the citation of authorities upon the subject would seem to involve only a waste of time. The animating principle of the proposition is that no one should nor will be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another. The act of an agent, within the scope of his authority, is the act of his principal, and hence the authority of an agent is so fraught with responsibility and gave concern to his principal, dealing as it does with the property rights of the latter, that it proceeds out of the highest considerations of confidence, which, the principles of equity demand, must be preserved to its utmost in transactions involving the exercise of such authority. Therefore an agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith, and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof is, upon its face, deemed by the law to be fraudulent. * * * In Rubidoex v. Parks [48 Cal. 215], the court (we quote the syllabus) lays down the rule as follows:

"The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; *but in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly.*" (Italics are ours.)"

[10-12] From the facts before us, and under the rules of law just announced, it follows that the burden of proving fair dealing and knowledge on the part of Alice L. Fisher rested on defendants. They failed to meet this burden and failed to overcome the presumption of bad faith and fraud on their part. In the absence of a finding in their favor the law presumes them guilty of fraud, which includes failure to inform their principal of their actions which resulted in their acquiring her property. As the law places on them the burden of producing evidence of notice and good faith they cannot complain of the lack of a finding which of necessity must have been against them. Consolidated Irrigation Dist. v. Crawshaw, 130 Cal.App. 455, 20 P.2d 119; 24 Cal.Jur. 944; 10 Cal.Jur.Ten Year Supp., 740, and cases cited.

[13, 14] Defendants next urge that the judgment should be reversed because the third amended complaint fails to state a cause of action against them. This argument is made, first, on the ground that it is not alleged that either plaintiff, Alice L. Fisher or Henry J. Young, had a defense on the merits to the quiet title actions, and, second, that courts are loath to set aside judgments of other courts in other actions when those judgments have become final.

It is true that there is no direct allegation, in so many words, in the pleading, that any one of the three parties had a defense to either quiet title action. However, the facts showing the conspiracy and constituting fraud and deceit, and facts showing the faithlessness of the defendants, are pleaded in great detail. These allegations clearly show that the three persons named had adequate defenses on the merits to the Kern county quiet title action and that plaintiff had an adequate defense to the Los Angeles county quiet title action, had these facts been then known to them. It is true that one court will seldom set aside a final judgment of another court of equal jurisdiction except in a case where extrinsic fraud is proven. In such a case there is, and should be, no hesitation to set aside a judgment obtained

by the extrinsic fraud of the successful party.

[15] Defendants next urge that the evidence offered on behalf of plaintiff was not sufficient to sustain the judgment in her favor in this action. This argument is again divided into two sections, the first dealing with the Kern county property, and the second with the Los Angeles county and Orange county properties. Before considering these arguments in detail it should not be out of place to say that outside of fiction we have never seen nor heard a story disclosing such a sequence of trickery, fraud, deceit and breach of trust as that presented by the record in the instant case. The judgment rendered is just. If it were to be criticized at all, it would be upon the ground that it did not go far enough in restoring to plaintiff and intervenor that which defendants wrongfully took from them. In view of the provisions of section 4½ of article 6 of the Constitution defendants would have to show us a grievous error of law of great magnitude to convince us that such an error had resulted in a miscarriage of justice sufficient to cause us to reverse the judgment.

[16, 17] Defendants argue that as far as the Kern county property is concerned, plaintiff knew that it was to be conveyed to the Young Holdings Corporation, Ltd.; that she voluntarily executed her deed to it; that she therefore cannot complain of her own actions that produced the result which she contemplated and intended, namely, of that corporation owning her interest in the Kern county property. We have already pointed out in great detail the fraudulent acts of defendants which produced this result. We will not repeat the review of that evidence. It should be sufficient for us to say that where a deed to property is obtained through a conspiracy and the fraud of those who benefit from it, the defrauded grantor may attack it and a court of equity may invalidate it.

[18] As an adjunct to the foregoing argument the defendants point to one of the by-laws of the Young Holdings Corporation, Ltd., which is as follows: "Board of Directors shall maintain by appointment, subject to removal at will, a special committee to be designated as the Charles Sumner Young Funding Committee, who shall pass upon, make plans for and otherwise advise with the Board of Directors in the disbursement of the funds, specially delegated by the

Board to the said Funding Committee in carrying out the plans and ideals of the Honorable Charles Sumner Young, deceased, and no expenditures shall be made by the said Board of Directors of funds allocated to said funding committee, except upon a majority vote of said funding committee, which shall comprise of five members of which the President shall be ex-officio head or chairman. Any stockholder shall be eligible to appointment upon said committee."

Defendants urge that the foregoing by-law shows their good intentions, and their desire to aid the American Indian. If they ever entertained any such good intentions they were never carried out. They must have reserved such good intentions for use as proverbial paving blocks for the streets of that unexplored realm for which no righteous soul departs and from which no wicked soul returns. The individual defendants were the chief beneficiaries from the property formerly belonging to the estate of Charles Sumner Young. Not one of them proved there was a drop of Indian blood flowing in his veins.

[19, 20] Defendants' argument to the effect that plaintiff cannot maintain this action as it affects her Los Angeles and Orange county properties is based on her letter of April 19, 1932, to J. D. Young (which we have quoted in full) in which she virtually admits that her conveyances to the Young Holdings Corporation, Ltd., were executed for the purpose of defrauding her creditors. We have already detailed the circumstances under which this letter was written and those deeds were executed.

The rule that a party coming into a court of equity must come with clean hands is firmly established. Where a plaintiff is a party to an act which is done to defraud her creditors, equity will generally deny her any relief but will leave her and her adversary in the position in which equity found them.

[21, 22] There is an important exception to the foregoing rule that is controlling here, namely, that a grantee who by fraud has induced his grantor to convey to him property to defraud the grantor's creditors cannot hide behind the act which was induced by his own initial fraud. *Chamberlain v. Chamberlain*, 7 Cal.App. 634, 95 P. 659, was such a case. It was there said (page 661): "Even conceding that in making the conveyance plaintiff was influenced somewhat by a desire to preserve his prop-

erty from sequestration by the creditors of the corporation, still giving full credit, as we must, to the evidence favorable to the judgment of the court below, we cannot find in that circumstance alone sufficient reason to disturb the findings. We are bound to accept as true that E. J. Chamberlain importuned plaintiff to convey the property to her upon the assurance that she would reconvey it on demand, that she made the promise with the intent to deceive him, and that he had confidence in her representations and therefore executed the deed. It follows, we think, upon the clearest principles of equity, that she could not take refuge behind the pretense that in yielding to her solicitations he committed a wrong against others, thereby depriving him of any redress for her gross misconduct. The law is more indulgent to human infirmity, and less tolerant of deliberate and obtrusive depravity. A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken." See, also, *Anderson v. Nelson*, 83 Cal.App. 1, 256 P. 294; *Grider v. Manisera*, 11 Cal.App. 2d 355, 53 P.2d 982; *Tognazzi v. Wilhelm*, 6 Cal. 2d 123, 56 P.2d 1227.

[23] Defendants further urge that neither plaintiff nor intervener has offered to do equity and restore the benefits which they received from defendants. They point out that the evidence shows that defendants expended about \$58,000 on the affairs of the Young Holdings Corporation, Ltd., and made some payments to Henry J. Young and perhaps to plaintiff. It might not be out of place to inquire how money spent on behalf of the Young Holdings Corporation, Ltd., was of any benefit to either the plaintiff or to Henry J. Young. They were not stockholders in that company. It seems to have been organized as one of the final steps in the conspiracy to denude plaintiff and Henry J. Young of all their properties and to be used as a cloak behind which defendants would attempt to hide their individual acts of fraud. Why either plaintiff or the estate of Henry J. Young should be required to repay money spent on the affairs of a corporation organized for the purpose of

holding property wrongfully taken from them and consummating the conspiracy and fraud of the individual defendants, does not appear.

[24-27] Further, a trustee is required to account to his beneficiary for the use of trust funds. This, defendants did not do, except to make the very general statement that there had been expended about \$58,000 in recovering the estate property and placing its title in the Young Holdings Corporation, Ltd., and other like expenses. If they had expended any money which their contracts with the brother and three sisters of Charles Sumner Young did not require them to expend, it was their duty to prove such expenditures. Defendants explained this failure of proof by saying that their books and records had been destroyed in the Montrose flood. The trial judge, being the sole and exclusive judge of the credibility of the witnesses and the weight and sufficiency of their evidence, had full authority to disbelieve this evidence of the amount expended and to reject it as untrue.

[28] Defendants urge that they had advanced money to Henry J. Young and had made personal loans to him not connected with his interest in the property of the estate of Charles Sumner Young, deceased. It is not clear that these loans were of such a character that they could be offset against any recovery in this action. At best they were merely personal loans. If any of the defendants were legitimate personal creditors of Henry J. Young, their remedy is a claim presented to his executor or administrator.

[29] Defendants next argue that no express trust was either alleged or proved. In this we agree with them. Plaintiff and intervener do not dispute this conclusion. The trust was an involuntary (constructive) trust as title to the property was acquired by fraud. Secs. 2215, 2217, 2223, 2224, Civ.Code; 25 Cal.Jur. 145, sec. 19, and cases cited; 11 Cal.Jur. Ten Year Supp., p. 6, sec. 19, and cases cited. That it was not a charitable trust follows from what we have just said.

[30, 31] Defendants urge that their plea of the statute of limitations should have been sustained. The trial court found that the fraud was discovered by plaintiff and Henry J. Young less than three years prior

PEOPLE v. WARNER.

Cr. 1621.

District Court of Appeal, Third District.
California.

June 21, 1938.

Hearing Denied by Supreme Court

July 21, 1938.

to the institution of this action and the filing of the complaint in intervention. There is evidence in the record to sustain this finding. Further, the only pleading of plaintiff in the record is the third amended complaint. The original complaint and its date of filing are not before us. Where the plea of the statute of limitations is interposed, a record that does not contain the date of filing the original pleading is defective. *Dougall v. Schulenberg*, 101 Cal. 154, 35 P. 635; *Sullivan v. Shannon*, Cal.App., 77 P.2d 498. Under such circumstances we must presume the action was commenced in time.

Defendants urge that the trial court erred in refusing to grant their motion for new trial. At the hearing of this motion they produced a transcript of a part of the testimony given by plaintiff on March 31, 1936, after the entry of the judgment in this action, incident to a motion to recall an execution in the case of *A. G. Reily v. Cora B. Young*, 21 Cal.App.2d 181, 68 P. 2d 1015. They maintain that her testimony there given conflicts with her evidence in the instant case, which formed the foundation for some of the findings in this case and that the granting of a new trial was mandatory under the rule announced in *Thomas v. Fursman*, 177 Cal. 550, 171 P. 301, and 20 Cal.Jur. 99. We have studied the portions of plaintiff's testimony in the *Reily* case upon which defendants rely and can find nothing in it sufficiently conflicting with her evidence and the findings in the instant case to have required the granting of the motion for new trial.

[32] Lastly, defendants urge that the evidence was insufficient to support many vital findings of the trial court and that certain findings are contrary to the evidence. They specify sixteen such findings. We have laboriously set forth a rather careful summary of the evidence supporting the judgment in this case. It fully supports those findings necessary to support the judgment. If other findings are not supported by the evidence we need not concern ourselves with them nor consider them in detail because they become immaterial as the judgment is fully supported by other findings. 24 Cal.Jur. 942.

The judgment is affirmed.

I concur: BARNARD, P. J.

80 P.2d—47

CAL.REP. 79-80 P.2d—35

1. Homicide $\Rightarrow$ 34

To establish offense of negligent homicide, it is not necessary to prove criminal negligence. St.1935, p. 173, § 500.

2. Homicide $\Rightarrow$ 34

The intention of Legislature in enacting statute creating offense of negligent homicide was to define a crime different from that provided for in definition of manslaughter and to cover a different class of crimes than those within purview of provisions of Penal Code. St.1935, p. 173, § 500; Pen. Code, §§ 192, 194.

3. Automobiles $\Rightarrow$ 352

Under information charging negligent homicide, it was only necessary to prove, other than jurisdictional facts as to time and place, that accused was driving a motor vehicle negligently and that such driving resulted in death of person therein named. St.1935, p. 173, § 500.

4. Automobiles $\Rightarrow$ 344

That truck driver charged with negligent homicide was not exceeding maximum speed provided by law did not necessarily mean, in view of all circumstances, that he was proceeding at a lawful rate of speed. St.1935, p. 173, § 500.

5. Automobiles $\Rightarrow$ 355(13)

Evidence that windshield of truck was "quite dirty," that truck driver had shortly before resuming his return trip drunk two bottles of beer, that he swung across roadway and approached parked truck on wrong side of the road causing death of child, and that, upon his trip earlier, truck driver had observed parked truck and trailer on one side of road, and had seen pile of boxes and children playing at side of road, warranted conviction of negligent homicide. St.1935, p. 173, § 500.

6. Automobiles $\Rightarrow$ 354

In prosecution for negligent homicide, evidence that accused had been drinking prior to time of collision with parked truck, that accused was driving with an obscured windshield, and that he did not have a driv-

er's license, was properly admitted, where there was no evidence that accused was intoxicated and fact that driver was operating with a dirty windshield was admitted only as a circumstance in proof of negligent operation of truck. St.1935, p. 173, § 500.

7. Criminal law ⚡564(1)

Evidence was sufficient to establish venue of negligent homicide prosecution in Yuba county. St.1935, p. 173, § 500.

8. Criminal law ⚡304(6)

The appellate court will take judicial notice of fact that part of boundary of county of Yuba is the Bear river.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Clark Edgar Warner was convicted of negligent homicide, and he appeals.

Affirmed.

Richard H. Fuidge, of San Francisco, and McGilvray & McGilvray, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order denying the motion for a new trial and from the judgment of conviction for a violation of section 500 of the Vehicle Code St.1935, p. 173.

The facts briefly are that defendant, on the day in question, was driving a truck along a narrow county road bordered upon both sides by cherry trees. The road was paved with oil macadam and varied in width from fifteen to seventeen feet. Some time in the morning of October 8, 1937, Mrs. Edna Choate and her husband, parked their Ford truck, to which there was attached a small trailer, on the side of this road near the vicinity of the bunkhouse on the Swetzer ranch, leaving their car in such a manner that the left front wheel of the truck was either on or immediately off the paved portion of the roadway. About the middle of the day defendant, proceeding easterly, driving a Dodge truck, passed the parked Ford truck. On his return trip about 4 o'clock in the afternoon, as he rounded a turn some distance westerly of the parked car

he again saw the truck and trailer parked in the same position as when he passed it earlier in the day. Just prior to this time Mrs. Choate carried a small child across the highway and opening the Ford door next to the driver's seat on the road side of the truck, placed the child on the seat and proceeded to change its clothing. As she thus stood at the side of the car leaning over the seat, Robert Choate, her grandson about four years of age, came to her from either across the highway or from the rear of the truck, and she, observing the oncoming car of defendant, drew the little boy close to her side as the car approached. As the truck driven by Warner approached the parked car of Choate it swung away from its proper side of the road and in a gradual curve drew to the side of the road upon which the Ford truck was parked. Just as the truck passed, Mrs. Choate felt an impact and then saw her grandson lying fatally injured on the ground about even with the rear wheel of the truck.

The testimony of Warner was that as he rounded the turn he saw the truck, but until after the accident saw neither Mrs. Choate nor either of the children. However, as he came down the road a small child, so he testified, started out from behind a pile of lug boxes across the road from the truck where several other children were at play, but seeing the truck approaching, turned and ran back. The defendant slackened his speed and swung over to his left in order to safely pass the boxes and avoid striking any of the children who might run out from behind the boxes. Just as he passed the Choate truck he felt a slight impact and brought his car to a stop. As he got out to see what had happened, he saw that the rear view mirror attached to the cab of his truck had been broken off, and hearing a woman scream he immediately ran back to the scene of the accident.

The evidence indicates that apparently the rear view mirror had struck the outside frame of the truck door which was standing ajar, and this impact had in some way thrown the little boy against the Ford truck and then against defendant's truck, causing his death.

Warner was duly charged, arraigned, and upon a trial by jury found guilty of a violation of section 500 of the Motor Vehicle Act, i. e., of unlawfully and negligently driving a motor vehicle on the left

hand side of the highway, and sentenced to one year in the Yuba county jail.

[1] It is the contention of appellant that there is nothing in the evidence to indicate criminal negligence, and that he was not negligent in any manner. It is not necessary, however, to prove criminal negligence to establish the offense of negligent homicide.

Section 500 of the Vehicle Code St. 1935, p. 173 reads as follows:

"When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide * * *."

Defendant maintains that section 500 of the Vehicle Code requires the same degree of proof as is necessary to establish manslaughter as defined in the Penal Code, sections 192 and 194.

[2] It is apparent that it was the intention of the legislature in enacting section 500 of the Vehicle Act to define a crime different from that provided for in the definition of manslaughter, and to cover a different class of crimes than those within the purview of the provisions of the Penal Code.

In the case of *People v. Pryor*, 17 Cal. App.2d 147, 61 P.2d 773, the information charged a violation of section 500 of the Vehicle Act. Appellant there contended the information was defective in that it charged him as having "wilfully" driven his automobile in such negligent manner as to cause death. Inasmuch as the information did charge a violation of section 500 of the Vehicle Code (negligent homicide), it was immaterial and harmless, the court held, that the information also charged facts which might constitute another offense, to-wit: manslaughter. The court then pointed out the distinction between a wilful act which resulted in injury or death and the performance of a mere negligent act, the wilful act being one intentionally performed while a negligent act was one merely carelessly done from a lack of ordinary prudence, the court saying (page 775):

"The offense of negligent homicide defined by section 500 of the Vehicle Code (St.1935, p. 173) does not depend on the

presence of the element of willfulness or intention to violate the law. The offense may be complete without any such purpose or intent. * * *"

[3] Under the information here filed against this appellant it was only necessary to prove, other than the jurisdictional facts as to time and place, that the appellant was driving a motor vehicle in a negligent manner and that such driving resulted in the death of the person therein named.

[4, 5] There is evidence that the windshield of the defendant was "quite dirty" and that he was somewhat blinded by the sun in his eyes. It is also in evidence that he had shortly before resuming his return trip, drunk two bottles of beer. There is no evidence, however, of any intoxication. It is also in evidence that the defendant swung across the highway and approached the parked car on the wrong side of the roadway. The fact of the impact shows that the appellant had so far swerved to his left as to come in contact with the parked car. It is also in evidence that he had, upon his trip earlier in the morning, observed the parked car and trailer on one side of the road and had seen the pile of boxes and children playing at the side of the road. The mere fact that he was not exceeding the maximum speed provided by law does not necessarily mean in view of all the circumstances that he was proceeding at a lawful rate of speed.

The foregoing facts would indicate that appellant was negligent in the operation of his truck, and the finding of the jury to that effect was sufficiently supported by the evidence.

[6] Objection is made by appellant that the court committed prejudicial error in permitting the prosecution to bring out that defendant had been drinking. It is claimed by defendant that the prosecution was attempting to prove something not alleged in the information and establish the fact that defendant was driving under the influence of intoxicating liquor. Appellant also claims that it was error to admit evidence that he was driving with an obscured windshield, which is also a misdemeanor not charged in the information, and was an attempt to prove that defendant was guilty of an unlawful act, not amounting to a felony, which under,

section 500 of the Vehicle Code was another offense than that charged in the information. It is also brought out on cross-examination that the driver did not have a driver's license, but as to that the court instructed the jury that that particular omission had nothing to do with the accident and they were instructed to disregard that fact. We do not believe the foregoing evidence was prejudicial. There was no evidence that the defendant was intoxicated, and although an examination for sobriety had been given by a doctor, no report by the doctor was filed. Also, the fact that the driver was operating the car with a dirty windshield was not a charge of a separate offense, nor was it an attempt to set up the fact that the death was caused by the commission of an unlawful act not amounting to a felony, but was admitted only as a circumstance in the proof of negligent operation of the truck.

[7] Another major point urged for reversal by appellant was on the question of venue. The only evidence introduced as to the location of the place of the accident was the testimony of Mr. Divver, who located the road upon which the accident occurred by reference to a map, testifying: "This drawing on the upper part of the map designates a road in the southern part of the colony that runs through the southern boundary line of E. M., J. L., and J. H. Swetzer property, located on the Johnson Rancho in Yuba County."

Further testifying concerning the road, the witness said: "This direction, the right hand side of the map, traveling east will take you towards Wheatland and if you travel towards the west on the road it will take you to Bear River."

It appears in evidence in the case at several points that the offense occurred near the Earl Swetzer place, and that the Earl Swetzer place was located on the Wheatland-Bear River highway. This evidence, coupled with the testimony by Mr. Divver, which places the Swetzer property on the Johnson Rancho in Yuba county, is sufficient to establish the venue.

[8] This court can also take judicial notice of the fact that a part of the boundary of the county of Yuba is the Bear river.

Finding no error justifying a reversal of the judgment of conviction, the judgment and order should be affirmed, and it is so ordered.

ment and order should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



27 Cal.App.2d 119

MERRON et al. v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 11398.

District Court of Appeal, Second District,
Division 1, California.

June 15, 1938.

Rehearing Denied July 13, 1938.

Hearing Denied by Supreme Court
August 11, 1938.

1. Malicious prosecution ☞34, 35(1)

In action for malicious prosecution of an attachment levied upon realty, it is essential that the proceeding complained of should have been finally terminated and terminated in plaintiffs' favor.

2. Malicious prosecution ☞54

In action for malicious prosecution of an attachment proceeding, where it was shown by language of opinion of District Court of Appeal in attachment proceeding that defendant was without legal right in obtaining the attachment, plaintiffs would be given opportunity to amend complaint to show such fact, since the illegal attachment and the prosecution and enforcement thereof constitute the basis of the action.

3. Limitation of actions ☞55(4)

Where the gist of the action is a malicious prosecution, the statute of limitations begins to run when the wrongful act is done. Code Civ.Proc. § 339.

4. Limitation of actions ☞31

The 2-year statute of limitation is applicable to an action for malicious prosecution. Code Civ.Proc. § 339.

5. Appeal and error ☞151(5, 6)

A litigant cannot prosecute an appeal from a judgment in her favor, nor from a judgment entered against her codefendants. Code Civ.Proc. § 938.

6. Courts ☞99(1)

In action for malicious prosecution of an attachment proceeding where on a prior action for malicious prosecution defendant

urged that action could not be brought until judgment in the attachment proceeding had become final, determination that action could not be brought until after judgment in the original proceedings became final became "law of the case" and could not be repudiated by defendant by urging that action commenced within 2 years after the judgment in attachment proceeding became final was barred by the 2-year statute of limitations. Code Civ.Proc. § 339.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

7. Limitation of actions ☞55(4)

An action for malicious prosecution commenced within 2 years after judgment in the original proceedings upon which action was based became final was not barred by limitation. Code Civ.Proc. § 339.

8. Action ☞50(3)

A complaint alleging that by reason of the malicious prosecution of an attachment levied upon personalty and realty several plaintiffs were damaged was not objectionable as improperly joining several purported causes of action.

9. Appeal and error ☞1178(8)

Where plaintiffs did not ask for leave to amend complaint in action for malicious prosecution and did not refuse to do so, and were not afforded an opportunity to amend, cause would be remanded on appeal so that plaintiffs could be accorded an opportunity to amend their complaint.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Marion Merron and others against the Title Guarantee and Trust Company, a corporation, and others for malicious prosecution of a civil action, the detention and conversion of personal property seized under a writ of attachment, and for the malicious prosecution of an attachment levied upon real property. From a judgment of dismissal in favor of named defendant, plaintiffs appeal.

Reversed and remanded, with directions.

Hearing denied by Supreme Court; EDMONDS, J., dissenting.

H. M. Mayes, of North Hollywood, for appellants.

M. J. Rankin, Seth I. Colver, Milo V. Olson, and Walter S. Home, all of Los Angeles, for respondent.

WHITEN, Justice.

This is an appeal from a judgment of dismissal entered in favor of defendant Title Guarantee and Trust Company after the trial court had sustained a demurrer to plaintiffs' complaint without leave to amend.

Plaintiffs commenced this suit to recover for malicious prosecution of a civil action; the detention and conversion of personal property seized under a writ of attachment; and for the malicious prosecution of an attachment levied upon real property. The complaint alleges that on or about December 1, 1931, defendant Title Guarantee and Trust Company filed its action against plaintiff herein, Sarah Stahler, to recover from her an alleged balance due on the purchase price of real estate sold to her upon a title-retained agreement of sale; and further alleges that with intent to injure plaintiffs the defendants did falsely and without probable cause and cause to be executed a writ of attachment upon certain properties of plaintiffs. It is then set forth in the complaint that upon the filing by Marion Merron (who was not then a defendant in the original complaint) of her claim to the personal property taken under attachment, the defendant did then cause to be filed an amended complaint, including said Marion Merron as a defendant, and wherein, it is claimed, it was falsely alleged that said Marion Merron was an assignee of said agreement of sale. Thereupon, it is alleged, defendant caused another and second writ of attachment to issue against the real and personal property in question. After alleging the absence of legality or probable cause on the part of defendants, the complaint further alleges that the trial court thereafter "adjudged that plaintiff therein, Title Guarantee and Trust Company, take nothing as against the defendant (therein) Marion Merron". The complaint then alleges that "on July 7th, 1936, the District Court of Appeal for the Third Appellate District of California found that the trial court erred in its refusal to dissolve said attachment, and that the said cause become final on September 4, 1936".

[1] As to appellants Sarah Stahler and Harry E. Stahler, it is the contention of respondent that no cause of action is stated for the reason that the complaint fails to allege that the action complained of had been finally determined in their favor. Without question, it is essential to the maintenance of an action such as this that the proceeding complained of should have

been finally terminated, and terminated in plaintiffs' favor. *Holliday v. Holliday*, 123 Cal. 26, 35, 55 P. 703; *Roos v. Harris*, 203 Cal. 201, 263 P. 225. Both parties to this appeal refer us to the proceeding complained of and which is entitled, *Title Guarantee & Trust Company v. Stahler et al.*, reported in 15 Cal.App.2d 239, 59 P.2d 515. On appeal in that case, the Third District Court of Appeal, after stating that no appeal was taken from the order of the trial court refusing to discharge the attachment and that the question could not therefore be reached on that particular appeal, nevertheless, with reference to the legality of the writ of attachment issued in the case, decisively says (page 516): "The first point urged upon this appeal is that the court erred in refusing to vacate this attachment. In that appellant is correct. The vendor, under an executory contract for the sale of real property, having retained title as security for the purchase price, is not entitled to an attachment. *Longmaid v. Coulter*, 123 Cal. 208, 55 P. 791; 3 Cal.Jur. 419." A hearing in this case was denied by the Supreme Court of September 4, 1936.

[2] It is at once apparent from the foregoing language of the District Court of Appeal that respondent herein was without legal right or warrant of law in obtaining the attachment here in question, and an averment of such fact would bring the present cause of action within the rule contended for by respondent. Appellants should be given the opportunity, if so advised, to amend their complaint accordingly. It was the obtaining by respondent of the illegal attachment and the prosecution and enforcement thereof that constitutes the basis of appellants Stahler's cause of action; and in the interests of justice they should be permitted to plead it.

[3-7] As to appellant Marion Merron, respondent contends that any cause of action in her favor is barred by reason of the running of the statute of limitations, Code Civ.Proc. § 339, requiring that an action for malicious prosecution must be brought within two years from the date of the levy of the attachment when the gist of the action is the alleged wrongful and malicious issuance and levying of the attachment. Undoubtedly it is the law that where the gist of the action is a malicious prosecution, the statute begins to run when the wrongful act is done, and the limitation is two years (*McCusker v. Walker*, 77 Cal. 208, 212, 19 P. 382), but it is also the law that before the

malicious prosecution action can be maintained it must be alleged and shown that the proceedings upon which it is based have been legally terminated. *Hurgren v. Union Mut. Life Ins. Co.*, 141 Cal. 585, 75 P. 168. This action upon which this litigation is predicated, in so far as appellant Marion Merron is concerned, was filed by respondent title company in the superior court in December, 1931. At the trial the court found for the defendant Marion Merron, on the basis of which an action for damages for malicious prosecution was filed by her in December, 1934. Having prevailed in the superior court, appellant Marion Merron could not prosecute an appeal from a judgment in her favor (Code Civ.Proc., sec. 938; *Smith v. Mingramm*, 104 Cal.App. 95, 285 P. 354; *Luckenbach v. Laer*, 190 Cal. 395, 212 P. 918), nor could she appeal from a judgment entered, as it was, against her codefendants. *Hibernia Sav. & Loan Soc. v. Ordway*, 38 Cal. 679. But here codefendants did appeal, and in answer to her action for malicious prosecution commenced in December, 1934, the respondent herein, who was the defendant in that suit, alleged in its answer that the order or judgment in the original action upon which Marion Merron's malicious prosecution suit was founded had not become final, and that therefore the malicious prosecution suit then commenced by her was premature. At the trial the superior court so held, and accordingly granted a motion to dismiss on that ground. On an appeal by Marion Merron to this court (*Merron v. Title Guarantee & Trust Company*, 11 Cal.App.2d 565, 54 P.2d 61), this court upheld the contention of the respondent title company that because an appeal was pending in the original action (*Title Guarantee & Trust Company v. Stahler et al.*, supra), the malicious prosecution suit by Marion Merron was prematurely instituted. The judgment on that appeal in the original action commenced by respondent title company and upon which the malicious prosecution action was based, became final about September 4, 1936, and the instant action for malicious prosecution now before us was commenced November 6, 1936, well within two years after the judgment in the original proceeding became final. The claim of respondent title company urged before and sustained by this court in the case of *Merron v. Title Guarantee & Trust Company*, supra, that the action for malicious prosecution could not be brought until the judgment in the case which gave rise to it

had become final, became the law of this case; and after successfully establishing that as the law of the case, respondent title company cannot now be heard to repudiate such law of the case as was established by the aforesaid decision. Consequently, as to appellant Marion Merron, the court below erred in sustaining the demurrer without leave to amend upon the ground that the statute of limitations had run against the same. The complaint, as to Marion Merron, states a cause of action against respondent title company.

[8] Respondent's claim that there is an improper joining of several purported causes of action is without merit. But one cause of action is stated, and it is alleged that by reason thereof several plaintiffs have been damaged. This is proper.

[9] Conceding that certain uncertainties and ambiguities exist in the complaint, as claimed by respondent, these might be corrected by amendment, which the court should permit to be made. While plaintiffs did not ask for leave to amend in the lower court, neither did they refuse so to do, nor were they afforded such an opportunity. In the face of the facts of this case as indicated by the record before us, we have no hesitancy in saying that the interests of justice require that plaintiffs be accorded an opportunity to amend their complaint if they be so advised.

The judgment is reversed and the cause remanded, with directions to the court below to proceed in accordance with the views herein expressed.

I concur: DORAN, J.



27 Cal.App.2d 102

DONAHUE v. MAZZOLI et al.
Civ. 10662.

District Court of Appeal, First District,
Division 2, California.

June 14, 1938.

Rehearing Denied July 14, 1938.

Hearing Denied by Supreme Court
August 11, 1938.

1. Automobiles ⇨173(5)

A truck driver who suddenly pulled truck slightly to the right and stopped it in street had duty to use reasonable care

in the operation of the truck, and was bound to comply with provisions of law relating to the giving of signals before stopping a vehicle on a highway, in order to escape liability for injuries to motorist in automobile which was following truck and collided with rear end of truck when the truck was stopped. St.1935, pp. 185, 186, §§ 544(c), 545.

2. Automobiles ⇨173(5)

The statutory provisions relating to the giving of signals by a motorist before suddenly stopping a vehicle on the highway prescribe cumulative duties and do not lessen the obligations of motorists under the general law. St.1935, pp. 185, 186, §§ 544(c), 545.

3. Automobiles ⇨173(1)

Under common law and under statute, a truck driver who suddenly pulled truck slightly to the right and stopped it in street had duty to operate truck so as to abstain from injuring the person or property of others, including motorist in automobile which was following the truck and which collided with the rear end of the truck when the truck was stopped. Civ.Code, § 1708; St. 1935, pp. 175, 185, 186, §§ 505, 544(c), 545.

4. Automobiles ⇨173(1, 2, 5)

In motorist's action for injuries sustained when his automobile collided with rear end of truck which was suddenly stopped in street, the motorist who pleaded general negligence of the truck driver was entitled to rely upon the common-law and statutory duty of the truck driver to operate truck so as to abstain from injuring the person or property of others, upon statute relating to reckless driving, or upon statutes relating to signals required to be given by a motorist who suddenly stops his vehicle on the highway. Civ.Code, § 1708; St.1935, pp. 175, 185, 186, §§ 505, 544(c), 545.

5. Automobiles ⇨245(17)

The negligence of driver of truck with which automobile following the truck from the rear collided when the driver stopped the truck suddenly without warning other than the warning given by danger signal lamp on the truck was for jury. Civ.Code, § 1708; St.1935, pp. 175, 185, 186, §§ 505, 544(c), 545.

6. Automobiles ⇨245(78)

Where an automobile was following truck at a distance of 15 or 16 feet and at a speed at which the automobile could be stopped in 10 or 12 feet, a motorist who

failed to stop the automobile within the 31 feet distance he had in which to stop the automobile in order to avoid a collision when the truck suddenly stopped in the street was not contributorily negligent as a matter of law, especially in view of amount and nature of the traffic in the street. Civ. Code, § 1708; St.1935, pp. 175, 185, 186, §§ 505, 544(c), 545.

7. Automobiles ⇄242(2)

Prima facie each case involving a rear end collision imports negligence, and explanations by the motorists involved in the collision are in order.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by John Donahue against Santos Mazzoli and another, for injuries sustained in an automobile collision. From an adverse judgment, the defendants appeal.

Affirmed.

Donald C. Young, of San Francisco, for appellants.

James C. Purcell, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover damages for injuries sustained in an automobile collision the trial court made findings in favor of the plaintiff and from the judgment entered thereon the defendants appealed. The defendant Ferrari was the owner and the defendant Mazzoli was the driver of a truck with which the plaintiff's car collided. They contend that the defendant Mazzoli was not negligent and that the plaintiff was, as a matter of law, guilty of contributory negligence.

[1-5] The accident happened near the corner of Norton and Mission streets in San Francisco at about 4:30 p. m. on August 26, 1936. It was clear and the streets were dry. Both parties had entered Mission street some distance to the north, and both were traveling toward the south. On Mission street there are two car lines, on one the cars run to the south and on the other they run to the north. The defendant Mazzoli, driving a Dodge truck, was in the lead and was traversing the westerly tracks going south. The plaintiff was behind him going in the same direction in the same path, driving a Plymouth sedan. Both were

proceeding at a speed of 18 or 20 miles per hour. As they crossed Norton they slowed down to about 14 miles per hour. Having crossed the intersection each increased his speed to about 18 or 20 miles and continued to the south. The plaintiff's car had been following the defendants' truck and at the time of the impact was following it at a distance of 15 or 16 feet—about the length of his car. On the right hand side of Mission street cars were parked, others were being parked, and still others were starting up and moving. Having passed Norton street a short distance the defendant turned slightly to the right and stopped. The Dodge truck was equipped with a signal lamp of a type approved by the department of motor vehicles of the state of California and the signal lamp was in good working order and was working at the time of the accident. As the truck stopped the plaintiff's car continued forward and struck the rear end of the truck, causing the injuries for which the plaintiff seeks to recover damages. The plaintiff testified that before turning and stopping Mazzoli gave no signal with his arm. Mazzoli testified he did. But he makes the further claim that his lamps gave the signal and that he was not bound to give both a signal by hand and a signal by a mechanical device. The defendants cite and rely on two sections of the Code. Subdivision (c) of section 544 of the Vehicle Code, St.1935, p. 185, is as follows: "544. *When Signal Required.* * * * (c) No persons shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." And section 545, St.1935, p. 186, is: "545. *Signals by Hand and Arm or Signal Device.* The signals herein required shall be given either by means of the hand or arm or by a signal lamp or mechanical signal device of a type approved by the department * * *." The finding thereon is as follows: "* * * that said Dodge truck was equipped with a signal lamp of a type approved by the Department of Motor Vehicle of the State of California; that said signal lamp was in good working order and was working at the time of the accident; that said signal lamp could be seen at a distance of more than two hundred feet at the time of the accident, that no other signal of intention to stop was given by the defendant Santos Mazzoli." The contention of the defendants, that the truck was not

negligently operated if the facts recited in the foregoing finding existed, is too broad. The plaintiff pleaded general negligence. *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663. Under some circumstances the contention of defendants might be well founded while under other circumstances it would not be. Under all circumstances the defendants were bound to use reasonable care in the operation of the truck. To that end they were bound to comply with the provisions of the law (secs. 544 and 545, supra) regarding signals. But those sections prescribe cumulative duties and do not lessen the obligations of the defendants under general law. *Ritz v. Cousins Lumber Co.*, 227 Mo.App. 1167, 59 S.W.2d 1072, 1076. Under the common law and under the statute (Civ.Code, sec. 1708) they were bound to so operate their truck as to abstain from injuring the person or property of another. Furthermore, under section 505 of the Vehicle Code, St.1935, p. 175, they were inhibited from operating their truck in a reckless manner. Under his pleading of general negligence the plaintiff was entitled to rely on any one of the foregoing theories and to have the jury instructed accordingly (*Amato v. Desenti*, 117 Conn. 612, 169 A. 611) and it was for the trier of the facts to determine whether the defendants were guilty of negligence.

[6] The defendants also contend that the plaintiff was guilty of contributory negligence as a matter of law. They show these uncontradicted facts: Both cars were, immediately preceding the accident, traveling 18 to 20 miles per hour. The space between them was 15 or 16 feet. The plaintiff could stop his car within 10 or 12 feet. The defendant Mazzoli could and did stop his car within 15 feet. Each second the cars moved 26.4 feet. How long it would take the plaintiff to remove his foot from the throttle and place it on the brake was not estimated, but it was conceded that it would take a fraction of a second. If and when he received a signal from his leader that the latter was going to stop, the plaintiff had 31 feet of space to stop in—16 feet (the space between the two cars) plus 15 feet (the distance the leader ran before coming to a standstill. He could stop in 10 or 12 feet. Considering these circumstances and also the amount and nature of traffic in the street, we think it may not be said that the plaintiff was, as a matter of law, guilty of contributory negligence.

80 P.2d—47½

[7] Cases involving rear-end collisions are many. Prima facie each case imports negligence and explanations are in order. Many different situations are presented and in each specific case due consideration becomes necessary to ascertain each pertinent circumstance and then give it due consideration. Although the contention has often been made that the leader alone was guilty of negligence or that the follower alone was guilty of negligence, in general it has been held that the case as made by each party presented a question of fact for the jury and was not solely a question of law for the courts. *Wright v. Clausen*, 253 Ky. 498, 69 S.W.2d 1062, 104 A.L.R. 480, and extended note, especially page 502.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



27 Cal.App.2d 182

Ex parte LYONS.

Cr. 512.

District Court of Appeal, Fourth District,
California.

June 18, 1938.

1. Counties ⇐55

As respects validity of ordinance, a governing body of a political subdivision such as a county is empowered to regulate the handling, transportation, and disposition of garbage within the area over which the subdivision's jurisdiction extends.

2. Counties ⇐55

A political subdivision such as a county may require the disposition of garbage within the area over which the subdivision's jurisdiction extends in some recognized method, and prohibit disposition in any other way.

3. Counties ⇐55

The particular method adopted by a political subdivision such as a county for disposition of garbage within the area over which the subdivision's jurisdiction extends is generally within the discretion of the gov-

erning board of the subdivision, and the reasonable exercise of such discretion will not be interfered with by the court.

4. Counties ☞55

Municipal corporations ☞607

The disposition of garbage within municipalities located in the county is a matter within the control of their respective governing bodies, whereas outside the limits of the municipalities, authority over the disposition of garbage belongs to board of supervisors of the county.

5. Counties ☞55

Municipal corporations ☞111(3)

The constitutional provision that all laws of a general nature must have a uniform operation has no application to ordinances of municipalities, counties, or other local bodies. Const. art. 1, § 11.

6. Counties ☞55

A county ordinance which unjustly discriminates may be declared unreasonable and therefore void.

7. Counties ☞55

A criterion to be used in determining whether an ordinance of a county is unjustly discriminatory and for that reason unreasonable is whether the classification attempted is based upon some constitutional, natural, or intrinsic distinction, and if it is so based, the classification of the ordinance so far as the distinction is concerned is reasonable, and if it is not so based, it is unreasonable.

8. Counties ☞55

An ordinance of Orange county purporting to prohibit the bringing of garbage into Orange county from counties outside of Orange county, under which the sole inhibition attempted had to do with the place of origin of the garbage, was arbitrary and void.

Original proceeding in the matter of the application of Charles J. Lyons for writ of habeas corpus to secure the release of the petitioner who was charged with violation of an ordinance adopted by the Board of Supervisors of Orange County relating to the transportation of garbage. The petitioner was admitted to bail by the District Court of Appeal pending the disposition of the habeas corpus proceeding.

Petitioner discharged, and his bond exonerated.

Charles D. Swanner, of Santa Ana, Hugh G. Maddox, of Long Beach, and Thomas L. McFadden, of Anaheim, for petitioner.

W. F. Menton, Dist. Atty., Preston Turner, Asst. Dist. Atty., and B. Z. McKinney, all of Santa Ana, for respondent.

HAINES, Justice pro tem.

This is an original proceeding in habeas corpus. The petitioner, Charler J. Lyons, was detained by the sheriff of Orange county under a complaint charging him with violation of an ordinance adopted by the board of supervisors of that county relating to the transportation of garbage and was, pending the disposition of the case herein, admitted to bail by this court. Section 1 of the ordinance undertakes to find as a fact that the bringing of garbage into Orange county from counties outside of Orange county, where large and small centers of population are located, is a menace to the public health, welfare and safety of the citizens of Orange county. Section 2 purports to make it unlawful for any person, association of persons, firm or corporation, to bring or cause to be brought, or haul or transport or ship into the county of Orange, any garbage of any kind or character produced outside of the county of Orange, for any purpose whatsoever. Section 3 provides for fine or imprisonment or both for violating the provisions of the ordinance, and a subsequent section (6) defines "garbage" as meaning:

"All animal and/or vegetable refuse, or residue from kitchens, canneries, bakeries, restaurants, lunch stands, and/or meat, fish, fruit, and/or vegetable markets, and/or other food handling places; and/or household waste and/or residue that shall result from the preparation and/or caring for and/or treatment of food stuffs intended to be used as food, and/or used as such, and/or shall have resulted from the preparation and/or handling of food for human consumption, and/or any decayed or unsound meats, fish, fruit and/or vegetables."

It appears that the petitioner, Lyons, is the owner of a 20-acre hog ranch located about two and one-half miles west and a half a mile south of Buena Park and something like half a mile on the Orange county side of the line dividing that county from Los Angeles county; that his practice is to feed his hogs one-fourth grain and three-fourths garbage, and to bring the garbage in what are known as garbage tanks from

Beverly Hills, in Los Angeles county, to his ranch. What is known as a garbage tank consists of a body on a truck, open at the top except for a canvas cover which covers the whole top and hangs over about a foot and a half over the back, front and the sides. It is not, however, air tight. Garbage is loaded from a garbage dump and about 20 tons of it brought daily to petitioner's ranch, where it is fed directly from the trucks to the hogs, and for that purpose placed on concrete floors. After the hogs are through with it, such refuse as remains is gathered up and used for orchard fertilizer. The accumulations of this refuse are allowed to pile up for from one to three weeks before being actually so used.

The organic matter of which garbage is made up is by its very nature likely to become offensive, and what may or may not be done with it is, therefore, necessarily a subject of public concern. Article 11, section 11, of the state Constitution provides that: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204, the Supreme Court of the United States upheld an ordinance passed by the board of supervisors of the city and county of San Francisco granting to a concessionnaire the exclusive right to maintain a garbage crematory within the city and requiring all collective garbage to be conveyed thither for cremation. After saying that this was no ground for complaint on the part of the householders, the court went on to say (page 105):

"Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt."

In *Ex parte Casinello*, 62 Cal. 538, the court sustained an order of the board of supervisors of the city and county of San Francisco providing that:

"No person shall throw into or deposit upon any public street, highway, or grounds, or upon any private premises, or anywhere except in such a place as may be designated for that purpose by the Superintendent of Public Streets and Highways,

any glass, broken ware, dirt, rubbish, garbage or filth."

The court said *inter alia* (page 539):

"The objections that the order is oppressive, unjust, and unreasonable are, in my opinion, not well taken. That dirt, rubbish, garbage, and filth are in their nature nuisances, is too plain to admit of controversy; and that glass and broken ware can be very easily converted into nuisances if thrown about promiscuously, is equally plain."

In *Re Zhizhuzza*, 147 Cal. 328, 81 P. 955, an ordinance of the city of Oakland was upheld which invested the duly authorized agents, servants or employees of the city with the exclusive right to gather and collect garbage within the city, and made it unlawful for any person, firm or corporation, except as otherwise provided in the ordinance, to collect or gather garbage within the city. The court, quoting from *Ex parte Haskell*, 112 Cal. 412, 416, 44 P. 725, 33 L.R.A. 527, and referring to *Ex parte McKenna*, 126 Cal. 429, 432, 58 P. 916, and *Ex parte Lemon*, 143 Cal. 558, 563, 77 P. 455, 65 L.R.A. 946, said with respect to the question of the reasonableness of a municipal ordinance of the description involved (pages 332, 333, 81 P. page 957):

"Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof."

[1-3] Without further discussion of the general powers of counties or other political subdivisions of the state to regulate the disposition of garbage within their limits, we take it to be the undoubted law that the governing bodies of such political subdivisions, where intrusted generally with the duties of local government therein, are empowered to regulate the handling, transportation and disposition of garbage within the areas over which their jurisdiction extends, and that they may, in pursuance of such powers, require the disposition of garbage in some recognized method and prohibit its disposition in any other way, and that

the particular method adopted is ordinarily within the discretion of the governing board or body and that the reasonable exercise of such discretion will not be interfered with by the courts.

[4] With these generally acknowledged and indisputable principles as a basis we proceed to inquire whether the regulation attempted in the instant case is of an essentially different character. What we have to consider in this case is not any question of the right of the board of supervisors of Orange county to regulate or prohibit the transportation of garbage for unnecessary distances on the highways, or the method of its disposition after being transported, but the much narrower question of whether the particular regulation here involved is a reasonable exercise of its power. To put the matter more concretely, there are in Orange county various municipalities, some such as Santa Ana, Fullerton, Orange and Anaheim, of considerable population. The disposition of garbage within each of these municipalities is a matter within the control of their respective governing bodies, whereas outside their limits authority over it belongs to the board of supervisors of the county.

It would, of course, be possible for each of these municipalities to provide for the cremation of such garbage as originates within its limits, without allowing it to be transported beyond them. For all of that, the board of supervisors has seen fit to leave the way open for garbage originating within each of these municipalities and all others within the county, to be transported thence to any other point within the county, but has fixed upon the county line as a limit across which garbage originating in another county may not be transported.

[5,6] It is settled that section 11 of article 1 of the Constitution to the effect that "All laws of a general nature shall have a uniform operation" has no application to ordinances of municipalities or other local bodies. *Hellman v. Shoulters*, 114 Cal. 136, 146, 44 P. 915, 45 P. 1057; *In re Zhizhuzza*, supra, page 334, 81 P. 955; *In re Gatsios*, 95 Cal.App. 762, 273 P. 826. *In Hellman v. Shoulters* the court said (page 146, 44 P. page 918):

"There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless, where they unjustly discriminate, they are sometimes declared unreasonable, and therefore void."

[7] The criterion to be used in deciding whether they are for that reason unreasonable is, after all, essentially the same used in determining whether general laws have or have not a uniform operation, which is whether or not any classification that they attempt is based upon some "constitutional, natural, or intrinsic distinction". *Martin v. Superior Court*, 194 Cal. 93, 100, 227 P. 762, 767. If it is so based then the classification and therefore the ordinance is, so far as the distinction made is concerned, reasonable; otherwise it is in that feature unreasonable.

Abe v. Fish and Game Commission, 9 Cal.App.2d 300, 49 P.2d 608, involved a statute purporting to require a license of every person who assists in the bringing of fish caught on the high seas into the state for sale in a fresh state, and to limit the right to receive such licenses to persons who have continuously resided in the United States for the period of one year. The provision was held invalid and in its decision (page 303, 49 P.2d 608) this court had occasion to discuss at some length certain of the bearings of the inhibition of the 14th amendment to the federal Constitution against the denial by any state to any person within its jurisdiction of the equal protection of the laws. As there stated (page 609):

"It has been held in this state that a city ordinance fixing a higher license for non-residents than that required of residents engaged in the same line of business is discriminating and not founded upon any reasonable ground of classification. *In re Hines*, 33 Cal.App. 45, 164 P. 339; *In re Hart*, 36 Cal.App. 627, 172 P. 610."

Again, in *Abe v. Fish & Game Commission*, *In re Kotta*, 187 Cal. 27, 200 P. 957, was adverted to, and particularly a discussion therein of the equal protection clause of the federal Constitution and a reference made to *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, in which it was said that "the equal protection of the laws is a pledge to the protection of equal laws". Reference was also made to *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 359, 28 L.Ed. 923, wherein it was among other things held that the 14th amendment, U.S.C.A.Const. Amend. 14, requires "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happi-

ness, and acquire and enjoy property; * * * that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition", etc.

[8] It is, of course, as clearly a discrimination against the inhabitant of another county than Orange to forbid him to dispose of his garbage in Orange county, as it would be to exact from him a higher license fee for conducting some business in Orange county than would be required of a resident of that county for engaging there in the same business. Likewise is it as clearly a discrimination against one inhabitant of Orange county to forbid him to obtain garbage from adjacent counties, when he can get it there more cheaply than in his own county, or when he can get it there when perhaps, by reason of insufficiency of supply, he could not get it in Orange county at all, whereas some other inhabitant of Orange county may, by reason of access to the limited supply of garbage there available, be both able to draw from that supply and to do so at a price with which his neighbor could only compete if allowed to draw his supply from an adjacent county. What reasonable justification is there for this type of discrimination?

The evidence here is that the garbage produced daily within incorporated municipalities in Orange county amounted to only about 29 tons, whereas (we take it as of the date the ordinance was adopted) the amount coming in daily from outside the county was about 200 tons. Ton for ton it cannot be said, speaking generally, that there is more risk to public health in the handling or transporting on public roads of garbage originating in one locality than that originating in another. Manifestly, however, the greater the quantity the more the risk. That that is the fact is also the testimony of the city health officer.

In the instant case, however, we are not confronted with an ordinance undertaking to limit the amount of garbage, as such, that may be used on hog ranches or elsewhere within the county of Orange, or that may be transported on the public highways of the county. Any amount may be so used and so transported so far as this ordinance is concerned, provided it originates within the county, even though it

originates within incorporated areas therein over which the police powers of the board of supervisors do not extend. The sole inhibition attempted has to do with the place of origin of the garbage. Garbage originating, for example, in the city of Whittier in Los Angeles county may not be used in Orange county, even though Whittier may, in distance, be closer to the Orange county ranch, where the garbage is sought to be used, than say Fullerton, which, for illustration we will suppose to be the Orange county city nearest to the same ranch. Between the same quantity of garbage originating on the one hand in Whittier or, on the other, in Fullerton, we are unable to find any sort of "constitutional, or natural, or intrinsic distinction". The existence of the county line in a particular position has no kind of relation to the evil which the ordinance apparently seeks to remedy. In these circumstances the ordinance provisions appear to us purely arbitrary, and by that token unenforceable.

The petitioner is discharged and his bond exonerated.

We concur: BARNARD, P. J.; MARKS, J.



27 Cal.App.2d 220

PRESCOTT v. O'CONNELL et al.

Civ. 10535.

District Court of Appeal, First District,
Division 2, California.

June 22, 1938.

1. Appeal and error ⇐900

An appellate court will never indulge in presumptions to defeat a judgment, and there are limitations on an appellate court's power to indulge in presumptions in support of orders or judgments.

2. Appeal and error ⇐663(1)

County clerk's certificate to judgment roll in effect certifying that appealing defendant filed no answer and announcement made in open court that action was not at issue as to that defendant dispelled any presumption to the contrary in support of judgment.

ment, and judgment was improperly rendered against appealing defendant.

3. Appeal and error ☞663(1)

On question whether a judgment was properly rendered against an appealing defendant, plaintiff's contentions that defendant made a general appearance and stipulated for trial on matters set forth in complaint were dispelled by county clerk's certificate to judgment roll in effect certifying that appealing defendant filed no answer and announcement made in open court that action was not at issue as to that defendant.

4. Appeal and error ☞934(1)

An appeal by one defendant from a judgment for plaintiff was a "direct attack," as regards existence of presumption in support of judgment.

[Ed. Note.—For other definitions of "Direct Attack," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Personal injury action by Carolyne Prescott against Kate O'Connell, etc., and others. From a judgment for plaintiff, Kate O'Connell appeals.

Judgment modified and as modified affirmed.

John C. Quinlan and Frank B. Thompson, both of San Francisco, for appellant.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover damages for alleged personal injuries the plaintiff named as defendants Kate O'Connell, Herman Faisst and Alfred Faisst. The latter two answered. The trial court made findings in favor of the plaintiff and from the judgment entered thereon Kate O'Connell has appealed.

She contends that as to her the judgment is void. The appeal is presented on typewritten transcripts. An examination of the clerk's transcript discloses that it purports to set forth the judgment roll in full. That roll contains copies of the complaint, amendment to complaint, answer, findings, judgment, and certificate, and no other documents or papers. After "Title of Court and Cause", the answer commenced with the recital, "Comes now defendants Herman Faisst, by his guardian Alfred Faisst,

and Alfred Faisst, two of the defendants named above * * *." In no place does it contain any allegation or denial of or in behalf of Kate O'Connell. In the body of the answer appear the expressions "these defendants", "said defendants", "of defendants", "the defendants", without naming any individual. It is signed by Colding, Hale and Myers "Attorneys for defendants". The findings use the word "defendants" without naming any individual. The judgment, however, is worded as follows:

"This cause came on regularly for trial, Geo. K. Ford, Esq., appearing as counsel for plaintiff, and Harry J. Colding and Theodore Hale, by Earl B. Myers, Esq., for the defendants. A trial by jury having been expressly waived by counsel for respective parties, the cause was tried before the court sitting without a jury. Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined; and certain documentary evidence was introduced, the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

"Wherefore, by reason of the law and the findings aforesaid,

"It is ordered, adjudged and decreed that Carolyne Prescott, plaintiff do have and recover from Herman Faisst, Alfred Faisst, Kate O'Connell, an Individual doing business under the firm name and style of Eureka Knitting Mills, Eureka Knitting Mills, defendant, the sum of Two Thousand and No/100 Dollars (\$2,000.00) with interest thereon at the rate of seven per cent. per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$36.75."

The reporter's transcript shows that when the action was called for trial the following occurred:

"The Court: Against whom are we proceeding?"

"Mr. Myers: Against Herman Faisst and Alfred Faisst.

"The Court: What about Kate O'Connell?"

"Mr. Myers: It is only at issue as to the two Faissts."

[1] In passing on the point made by the appellant it is settled law that an appellate

court will never indulge in presumptions to defeat a judgment. 2 Cal.Jur. 852, Appeal and Error, sec. 499. But there are limitations on an appellate tribunal's power to indulge in presumptions in support of the orders or judgments of a court. 2 Cal.Jur. 855. In *Johnston v. Southern Pacific Co.*, 150 Cal. 535, at page 537, 89 P. 348, at page 349, 11 Ann.Cas. 841, the court said: "There is, however, a well-defined limit to an appellate tribunal's power in indulging in such presumptions. It can indulge in no presumption which does violence to the facts as presented by the record of the inferior court, and while it is true that an order of a court of general jurisdiction will be treated as void only in the event that its invalidity appears upon the face of the record, ever since the case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am.Dec. 742, the rule in this court has been well settled that this does not mean that the record must contain a direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done, but means that want of jurisdiction appears whenever what was actually done is stated, and this which was done is not sufficient in law to confer jurisdiction. Therefore, whenever, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than is averred. *Galpin v. Page*, 18 Wall. 350, 21 L.Ed. 959; *Smith v. Los Angeles, etc., Co.*, 98 Cal. 210, 33 P. 53." Furthermore, in *Watson v. Lawson*, 166 Cal. 235, at page 241, 135 P. 961, at page 963, the court said: "In applying a judgment, 'if the language be in any degree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment, to the condition of the cause in which it was entered'. *Ex parte Ambrose*, 72 Cal. [398], 401, 14 P. [33], 35; *Treat v. Laforge*, 15 Cal. 41; *Etter v. Hughes*, 5 Cal.Unrep. 148, 41 P. 790. A judgment 'must be construed with reference to the law regulating the rights of the parties'. *Burnett v. Whitesides*, 15 Cal. [35], 37. Where only one count of the complaint is sufficient to support a judgment, it will be presumed, on appeal, that it was based solely on that count. *Nielsen v. Provident, etc., Soc.*, 139 Cal. [332], 339, 73 P. 168, 96 Am.St.Rep. 146. 'In case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be ex-

amined for the purpose of removing the doubt.' 1 *Freeman on Judgments*, § 45. 'When it admits of two constructions, that one will be adopted that is consonant with the judgment that should have been rendered on the facts and the law of the case.' 1 *Black on Judgments*, §§ 3, 123; *Peniston v. Somers*, 15 La. Ann. [679], 680."

[2] Looking back at the portions of the record which we have quoted, these facts are presented. The defendant Kate O'Connell claims the trial court held no trial and under the law could have held no trial of her rights and liabilities because the action was not at issue so far as she was concerned. In support of that contention there is the certificate of the county clerk to the judgment roll, which in effect certifies she filed no answer. Furthermore, there is the announcement made in open court that the action was not at issue as to her. The facts just recited dispel any presumption to the contrary. *Webber v. Johnston*, 214 Cal. 378, 5 P.2d 886.

[3, 4] The plaintiff intimates that Kate O'Connell may have made a general appearance and if so she thereby conferred jurisdiction on the trial court to try the action and render the judgment. *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15; *Maple v. Walser*, 131 Cal.App. 631, 634, 21 P.2d 984. That claim was, we think, dispelled by the facts hereinabove recited. The same reasoning applies to the claim of the plaintiff that this defendant stipulated for trial on the matters set forth in the complaint. *Miklauschutz v. Superior Court*, 16 Cal.App. 226, 116 P. 376. As noted above, the defendant is appealing from the judgment, that is, she is making a direct attack thereon. In *Sichler v. Look*, 93 Cal. 600, at page 606, 29 P. 220, at page 221, the court said: "Upon a direct attack, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, *but, in all matters of which the judgment contains a record*, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon a collateral attack." (Italics ours.) But in the instant case the judgment record contains no recital to the effect that Kate O'Connell had filed an answer, that the action was at issue, that Kate O'Connell was present, or that she was represented.

The judgment as rendered is modified by striking therefrom the following: "Kate O'Connell, an individual doing business under the firm name and style of Eureka Knit-

ting Mills, Eureka Knitting Mills," and as so modified the judgment is affirmed. The defendant Kate O'Connell will have and recover her costs on appeal.

We concur: NOURSE, P. J.; SPENCE, J.



27 Cal.App.2d 195

WRIGHT v. PRUDENTIAL INS. CO. OF AMERICA.

Div. 2055.

District Court of Appeal, Fourth District, California.

June 21, 1938.

Hearing Denied by Supreme Court
August 18, 1938.

1. Insurance ⇨665(5)

Evidence indicating that workman suffering from disseminated sclerosis had become so disabled that while group life policy was still in force he should have stopped work permanently and entirely, but that workman continued to follow his occupation as best he could, though inefficiently, and to receive full compensation, until policy was no longer in force, *held* to authorize recovery of disability benefits on ground that workman was "totally and permanently disabled" so as to be "wholly, continuously and permanently unable to perform any work for any kind of compensation" within terms of policy.

2. Insurance ⇨516

The test of total and permanent "disability," within terms of group life policy with disability provisions requiring that insured be "wholly, continuously and permanently unable to perform any work," is not what insured actually did in effort to perform his duties, but what, in the exercise of due prudence, he was reasonably able to do.

[Ed. Note.—For other definitions of "Disability," see Words & Phrases.]

3. Appeal and error ⇨1010(1)

Whether an insured was totally and permanently disabled while group life policy with disability provisions was in force, so as to be entitled to recover, is a fact question on which trial court's determination, in so

far as founded on any substantial evidence, is binding upon reviewing court.

4. Insurance ⇨516

Under group life policy providing total and permanent disability benefits, and also providing that loss of sight of both eyes, or of use of both hands, or feet, or one hand and one foot should constitute total and permanent disability, it is not essential that any of such specified situations occur in order that there be such disability, but only that some ailment or combination of ailments result in disability.

5. Insurance ⇨144(1)

Where employer substituted cheaper group life policy without disability provisions for former policy that had disability provisions, not informing employee of change nor decreasing wage deductions in consequence of such substitution, and employee, when he demanded disability benefits, was tendered a certificate issued under the substituted policy, reciting that "this certificate supersedes all former certificates issued * * * [under the former policy]," and accepted such certificate only after insurer informed him that "consideration will be given the claim" if disability occurred while former policy was in force, employee's acceptance of new certificate did not preclude recovery of benefits.

6. Insurance ⇨516

Where employee received individual certificate for group life insurance with disability provisions in April, though anniversary date of master policy was in December, increase of amount of insurance for employees of three years' service, which individual certificate provided would take effect "on anniversary date of insurance contract," did not become effective until December.

7. Insurance ⇨516

Under group life policy providing for increase of disability benefits for employees of three years' service, increase was automatic on anniversary date of master policy, irrespective of date of issuance of certificate of increase.

8. Contracts ⇨210

It is competent for parties entering into a contract to agree that contract shall be dated as of a previous time.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by David S. Wright against the Prudential Insurance Company of America, to recover disability benefits under group policy. From a judgment for plaintiff, defendant appeals.

Modified and, as modified, affirmed.

Hickcox & Provence, of El Centro, for appellant.

John G. Cope and H. R. Skinner, both of Los Angeles, for respondent.

HAINES, Justice pro tem.

On December 1, 1925, the Imperial Valley Milk Producers Association, a corporation doing business in Imperial valley, to which we shall hereinafter refer as the "Milk Producers Association," obtained from appellant, The Prudential Insurance Company of America, hereinafter referred to as "appellant insurer," for the benefit of its employees, or such of them as should agree to participate therein, a policy of group insurance numbered G-1904, which was issued upon what is known as the one-year renewable term plan. To the original application for the policy made by the Milk Producers Association there was attached a schedule of the employees to be initially insured thereunder, and the application, which became part of the contract, contained the following language:

"Each of said employees is to be *insured* in accordance with the following

"Plan of Insurance

"Scale of Benefits

"(1) On effective date of contract, insured employees to have at least \$500 insurance.

"(2) Insured employees whose term of service is one year, but less than two years, \$1,000 insurance.

"(3) Insured employees whose terms of service is two years, but less than three years, \$1,500 insurance.

"(4) Insured employees whose term of service is three years or more, \$2,000 insurance.

"(5) In future, no employee shall be eligible for insurance until one month in service of Association.

"(6) On anniversary date of insurance contract, each employee insured for less than \$2,000 insurance to be increased according to above scale."

Under the head of "General Provisions" the master policy issued to the Milk Producers Association contained this clause:

"Additions to the Number of Insured.—New Employees of the Employer eligible for insurance in the group or class insured under this policy may from time to time, subject to evidence of insurability satisfactory to the Company, be added to the group or class originally insured hereunder, and, subject to the terms of the Policy, insured in accordance with the plan of insurance set forth in the application for this Policy, provided that no evidence of insurability will be required of employees added within sixty days from the date of eligibility according to the Plan of Insurance. The employer shall notify the Company whenever such new employees are to be added, and, if premiums be payable otherwise than monthly, premium adjustments effective from the date when such additions are made shall be made as provided in the clause headed 'Payment of Premiums'. The Employer's payrolls and other similar records shall be open for inspection by the Company for the purpose of determining the amounts of insurance under this Policy and the premiums therefor."

The premiums were to be paid quarterly in advance by the Milk Producers Association to appellant, the insurer, the first payment to be made coincidentally with the issuance of the policy, in amounts fixed with reference to the ages of the respective employees, it being stipulated that the Milk Producers Association and the employees should contribute jointly toward the amounts required to make the payments; that the contribution of the Milk Producers Association should not be less than 25 per cent of the total premium and the contribution of an individual employee not more than 60 cents per month for each thousand dollars of insurance. In the payment of any premium under the policy, except the first, a grace of 31 days, without interest, was to be allowed, during which the policy was to remain in force. It was provided with respect to renewals, that:

"This policy is issued upon the one-year renewable term plan and may be renewed on each succeeding anniversary of its date for successive terms of one year each, upon the payment on or before the date of each renewal of the premium for the amount of insurance to be renewed."

On December 20, 1926, by mutual agreement between the Milk Producers Association and the insurer the policy was so amended as to provide that December 21, 1926, and subsequent anniversaries thereto were to be considered the anniversaries of the date of the policy for the purpose of renewals. The contemplated insurance was upon the lives of the respective employees, payable at death to such beneficiary as they should respectively designate, but a provision for total and permanent disability benefits for assured employees was also included. Respondent, Wright, who had previously been in the employ of the Milk Producers Association, re-entered its employ early in 1931, and signed an "authorization of payroll deduction" wherein and whereby he authorized the Milk Producers Association to deduct 30 cents a month from his wages to apply toward the premium for group insurance; and on April 15, 1931, pursuant to the terms of its said policy G-1904 appellant insurer issued to respondent an individual certificate numbered 95 insuring respondent in the amount of \$500. This certificate in which respondent is designated as "the employee" contains, among other provisions, the following:

"If the said employee, while less than sixty years of age, and while the insurance on the life of said employee under said Policy is in full force and effect shall become totally and permanently disabled or physically or mentally incapacitated to such an extent that he or she by reason of such disability or incapacity is rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value during the remainder of his or her lifetime, said amount of insurance will be paid to said employee either in one sum six months after the Company has received due proof of such disability or incapacity, or in monthly instalments during five years, the first instalment to be payable immediately upon receipt by the Company of due proof of such disability or incapacity; in accordance with the provisions of said Policy. The disability benefits will be granted subject to cessation, in accordance with the provisions of the Policy, should such disability or incapacity prove to be temporary and not permanent. The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, will be considered total and permanent disability or

incapacity within the meaning of the provisions of said Policy."

Respondent's insurance was without further action on his part from time to time increased in amount. Respondent claims and the court found that under the terms of the group policy its amount became \$2,000 as of April 15, 1934, that being three years after respondent actually acceded to the group insurance plan. Appellant insurer claims that the increase to \$2,000 did not become effective until December 1, 1934, as we take it, for the reason that a rider acknowledging such increase was issued bearing that date. Why that date should have been selected and inserted in the rider we do not know. At all times with which we are concerned there were deducted monthly by the Milk Producers Association from his wages and included by it in premiums which it paid quarterly to appellant insurer, 60 cents per month for each thousand dollars of insurance carried by him, except that the first deduction in the amount of \$1.20 which would correspond to a coverage of \$2,000 was due on January 5, 1935, that is from respondent's December wages.

However, on December 21, 1934, the annual anniversary date of the said group policy G-1904, the Milk Producers Association, for reasons of economy, instead of renewing this policy, took out a substitute policy numbered G-4780, which omitted all provision for disability benefits and thenceforward paid to appellant insurer correspondingly reduced premiums. No change was, in consequence of this substitution, made in the amounts deducted from the wages of employees as their contribution toward the payment of premiums. When this substitution was effected or attempted, appellant insurer issued to the Milk Producers Association individual certificates for its employees, including one numbered 41 for respondent, but the assistant secretary of the Milk Producers Association neglected either to deliver this certificate to respondent, or acquaint him with the change in the policy carried and he seems to have known nothing about it until February 16, 1936, when the condition of his health compelled him to leave the employ of the Milk Producers Association, whereupon, upon demanding his disability benefits he was, for the first time, informed of the substitution and was tendered the said certificate 41, which he at first refused to accept, though on February 25, 1936, that is after he had left the employ of the Milk

Producers Association, he did accept it. This certificate 41 contains the language:

"This certificate supersedes all former certificates issued to the employees named herein in connection with Group Life policy G-1904 which is no longer in force."

Respondent did not, however, accept this certificate 41 until he had received a letter from appellant insurer dated February 24, 1936, saying *inter alia*:

"You realize, of course, that policy G-1904 has been cancelled, but if the evidence shows that your disability dates back to the time when the policy was in full force, and also if the evidence shows that you are totally and permanently disabled, consideration will be given the claim."

Respondent's education stopped with the seventh grade. His occupation was that of assistant engineer in the boiler room of the Milk Producers Association. He was employed on night shifts, sometimes in the evening and sometimes in the early morning. His duties incidentally required him from time to time to handle and stock hundred-pound sacks of dried milk. Respondent testified that he had no disability in 1931, when he became a participant in the group insurance, that his physical condition was then perfect and continued to be such into the spring of 1934; that he first began to notice a change in his condition in September, 1934. "The change was that I would get up out of bed at twelve thirty at night to go to work. I would crawl around through the room while I got my clothes on and got to work. Then I would feel better and go on and do my shift." He says that his hands and legs were then all right but the difficulty he felt was in his hips and that he "figured it was kidney trouble". Also his right eye was beginning to get dim. Previously he had had good eyesight. By September he could see, but not with his right eye. He had had no accident to it. In October, 1934, he went to a Dr. Webster, who took a test and when he got through said: "It is a nervous trouble and I can't do anything for you." Respondent says that: "In October my feet got numb and then it raised out of my feet to my hands and then it kept getting worse all the time." He got tired and his feet wouldn't track. He couldn't control them. They were slow. If he got in the dark he was lost. His left eye continued good until about the first of the year (1935) and then it started getting weak, but his right eye was getting worse all the time.

In October, 1934, the numbness was starting in his right hand and that was when he went to Dr. Webster. In November, 1934, he first was somewhat better and then became worse. In November he couldn't, with his right eye, see the steam gauge on the boiler. He had to do as little work as he could. He couldn't really do a man's work but "got by". He got worse in December, 1934, particularly in his hands. He could hardly write with his right hand. He tried to drive some screws but could not. He laid off for a week. He continued thereafter to work as best he could. He piled his milk bags low "and let the other boys pile their up higher". In December, 1934, his right eye was practically gone and his left eye weakening. In 1935 he went on with his work. He "wasn't doing it right but got by with it" without being discharged.

In February, 1936, he was "messaging around with it", not performing it right, but "getting by with it", until he finally made up his mind to quit. His right eye has been completely gone since January, 1936.

Dr. O. L. Webster, a duly qualified physician and surgeon, testified that he made a thorough examination of respondent on October 4, 1934; that respondent had a loss of sensation in the tips of his fingers; that his biceps were diminished and that he was suffering from a disseminated sclerosis, that is a degeneration or wasting away of the spinal cord. Webster again examined him on October 25, 1935, at which time "his symptoms were worse and his condition exaggerated. He had considerable weakness and his reflexes were more diminished. At the present time medical science offers no cure for the disease. It is permanent. It is doubtful if he will regain the use of his hands." Webster says that in October, 1934, he told respondent that it was dangerous for him to continue to work. Disseminated sclerosis is a progressive disease, but there are remissions at times. Its exact cause is unknown and the exact time of its inception also unknown, so far as the possibility of its being objectively determined is concerned.

L. A. Bowman, a chiropractor, cared for respondent from January 1, 1935, for a time. He found a curvature of the spine and partial paralysis, lack of coordination in the use of the hands, trouble in walking, partial paralysis in the diaphragm. On January 7, 1935, an X-ray was taken. Bowman thought at first that the trouble

was a partial paralysis, but he now thinks it must be a nervous or other condition at the spinal cord. Bowman advised respondent to quit work.

H. A. Blume, another chiropractor, testified to treating respondent beginning with September, 1935, and concluded that he had "rotary scoliosis of the spine or neurosis of the nerves and the spinal cord". On September 1, 1935, respondent was "blind in one eye", had extreme weakness, couldn't walk except by holding on to something, his spine had very bad lateral curvature; he felt weak in the legs below the hips. Blume last examined him on November 27, 1935, when his condition was not essentially changed. In his opinion the disability is permanent. He thinks the cause is "nerve pressure".

One Lott, the general manager of the Milk Producers Association, testified that when respondent came to work with that concern in 1931 he was in good condition; that by the fall of 1934, however, respondent had at times difficulty in maintaining the use of his arms and limbs and complained of numbness in his lower limbs particularly; that he had a recurrence of these spells from time to time, including one in the fall of 1935 and "up to the time he left us in '36"; that he, Lott, at a time which he is unable to fix, had a talk with respondent relative to changing his work; that respondent at that time informed Lott of his condition and described his feelings and the report of his physician; whereupon Lott advised him to take off time whenever he should, that is, not to attempt to work when it was not safe, and expressed a willingness to have other men in the plant do part of respondent's work and thereby to help him make his job as light as possible. After this, Lott says that he confined respondent's work mainly to watching the machinery, firing the boiler and so forth, leaving it optional with respondent to what extent he participated in handling the milk and piling up the sacks of dried milk.

One Savage, assistant secretary of the Milk Producers Association, testified that he had been with that organization since November, 1927, and knew respondent; that in February of 1931 respondent had appeared to be in good physical condition; that, however, in the fall of 1934 respondent was "sick and off duty"; that during part of the time that respondent was working he was able to get around; that at times respondent would not have good control over his hands; that as Savage under-

stood the matter respondent did not have feeling in his fingers at times.

There is some discrepancy between the testimony above recited and respondent's pleadings with respect to the time when his disability began. It is in this connection alleged in paragraph IX of the first cause of action in his complaint that:

"That on or about the 16th day of January, 1934, said plaintiff was compelled to cease work intermittently because of sickness and disease and remain absent from his employment to the 31st day of January, 1934, and for the same illness and disease was later incapacitated from employment from the 16th to the 28th day of February, 1934, and from the 1st day of March to the 15th day of March, 1934, and from the 14th day of October, 1933, to the 24th day of November, 1935, and on the 16th day of February, 1936, has been totally and presumably permanently disabled and physically incapacitated to such an extent that he, by reason of such disability and incapacity, is rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value."

This is followed in paragraph X by the allegation:

"That on and prior to the 1st day of September, 1934, the plaintiff herein became and was permanently, as well as totally disabled so as to presumably for life be prevented from engaging in any occupation or employment for wage or profit. That on and prior to said date he had suffered the loss of use of both hands, and numbness and slowness of the use of his feet, as well as defective vision and lack of muscular coordination. * * *

Both of these paragraphs are by adoption embodied also in respondent's second cause of action and both are denied in toto in the answer. The court's findings on the subject are those numbered VII and VIII, which are respectively as follows:

"VII. That plaintiff, due to physical disability, was, during the times alleged in paragraph IX, of his complaint, and during other times, compelled to cease work; that during the month of October, 1934, plaintiff's physical condition was such that at that time he was advised by competent medical advisers that his condition would at all times thereafter be one of total disability and incapacity; that said condition was permanent, and from that date he would be for the rest of his life wholly,

continuously and permanently unable to perform any work for any kind of compensation of financial value; that plaintiff's employer, the Imperial Valley Milk Producers Association, continued his name on its pay roll to and including the 16th day of February, 1936, when, at plaintiff's request, his name was removed therefrom.

"VIII. That during the month of October, 1934, plaintiff suffered the loss of the use of both hands and numbness and slowness of the use of his feet, blindness of one eye and defective vision of the other eye, and lack of muscular coordination; that the said loss of the use of said members of his body, as well as the lack of muscular coordination existed prior to his attaining the age of sixty years, while he was the employee of the Imperial Valley Milk Producers Association. The above mentioned total and permanent disabilities occurred while said insurance contract with defendant herein sued upon was in full force and effect; that plaintiff at all times complied with all the conditions upon his part to be performed as required of him under the terms of his contract with the said insurer."

The ultimate question, then, that we are called upon to decide is, as correctly stated in appellant's brief:

"Is the evidence sufficient to support the finding that the plaintiff became totally and permanently disabled while the policy of group insurance under which he sues was in full force and effect?"

There is no dispute that the policy sued upon (G-1904) was, in some amount at least, in force as to respondent at all times between April 15, 1931, and December 21, 1934, and if, therefore, at any time within that period, he became totally and permanently disabled, he is entitled to recover the amount of insurance in force in his favor when such total and permanent disability occurred.

[1] In the light of the medical and other evidence recited and in support of the trial court's findings, we must, as we think, take it to be true that, as early as the fall of 1934, respondent's ailment had reached a stage when, in the exercise of ordinary care for his own health, he ought to have ceased work, not temporarily only, but permanently and entirely. This he did not in fact do, but instead, continued, as best he could, to follow his occupation until February 16, 1936, and to receive compensation for such services as he in the

meantime rendered. Does that circumstance make it impossible to consider his permanent and total disability as dating from the fall of 1934? The answer to this question depends on which of two lines of conflicting authorities shall be held to be the law in this state. On the one hand are cases adhering to the strict letter of the policy, such as *Equitable Life Assurance Society of U. S. v. Singletary*, 4 Cir., 71 F.2d 409; *Boozar v. Equitable Life Assurance Society of U. S.*, 206 N.C. 848, 175 S.E. 175; *Boyd v. Equitable Life Assurance Society of U. S.*, 274 Mich. 1, 263 N.W. 780; *Stewart v. Pioneer Pyramid Life Ins. Co.*, 177 S.C. 132, 180 S.E. 889; *Bean v. Travelers' Ins. Co.*, 164 Okl. 135, 23 P.2d 216; *Pegues v. Equitable Life Assurance Society of U. S.*, Mo.App., 57 S.W.2d 705; relied on by counsel for appellant.

In *Equitable Life Assurance Society of U. S. v. Singletary*, supra, the plaintiff was in the employ of the Southern Railway up to June 15, 1931, and while so engaged was covered by insurance against total and permanent disability. There was evidence that he had had periodic attacks of dysentery for several years prior to 1931 whereby he was usually disabled for from one week to a month. In the fall of 1931 he had had a particularly severe attack and by June, 1932, an abscess of the liver had developed, accompanied by partial paralysis. To some extent he recovered from this, but not sufficiently to permit him to do any work. There was no evidence that the plaintiff suffered from a disabling attack of dysentery in June, 1931. He had worked up to June 8th and made repeated attempts in the following week to retain his job. There was no medical testimony to show that he was seriously afflicted with dysentery or prevented from working during the summer of 1931. The court said that (page 411):

"In this state of the evidence, we cannot agree that it might reasonably be concluded that plaintiff's condition was such, on or prior to June 15, 1931, as to wholly and presumably permanently prevent him, for life, from pursuing any and all gainful occupations."

In *Boozar v. Equitable Life Assurance Society of U. S.*, supra, the evidence at the trial was that while the plaintiff was insured under a policy against total and permanent disability, existent during his employment, he contracted a disease which,

by its very nature, affected his mind. It was progressive and incurable. Notwithstanding his having contracted the disease he continued to perform his work as an employee of the concern for which he had been working and earned and was paid full wages until he was finally discharged for a breach of one of its rules. Some months thereafter he was adjudged insane as a result of the disease referred to and became both totally and permanently disabled thereby, and unable to engage in any occupation of financial value. The court held that inasmuch as he was able to perform and did perform the duties of his employment up to and including the day of his discharge, which terminated his insurance, he could not in the meantime be held to have suffered total and permanent disability such as to entitle him to the benefits of the policy.

In *Boyd v. Equitable Life Assurance Society of U. S.*, supra, the plaintiff was an employee of a rubber company. Its employees participated in group insurance wherein they were insured against such disabilities as should wholly and presumably permanently prevent them from following any gainful occupation. The insurance by its terms automatically ceased with the termination of the employment. The plaintiff was overcome by aniline dye fumes while at his work and was in the hospital for a week, after which he returned to work, but later gave it up. Some time after doing so he was found to be disabled by pulmonary tuberculosis, which the trial court apparently attributed to the injury from the dye fumes. The judgment in his favor was reversed, the court saying *inter alia* (page 783):

"It is not sufficient under the terms of the policy here involved to establish that during the time plaintiff's certificate was in force he became afflicted with a disease which subsequent to the lapse of his certificate resulted in his being totally and permanently disabled. * * * Under the record before us it must be held plaintiff has failed to prove that his total and presumably permanent disability developed during the period his insurance was in force."

No reference was made in the opinion in this case to the earlier Michigan case of *Starling v. Supreme Council Royal Templars of Temperance*, *infra*.

In *Stewart v. Pioneer Pyramid Life Insurance Co.*, supra, it was held that in an action on the disability clause of a life

insurance policy where the condition to recovery was the occurrence of total and permanent disability, an insured who regularly and continuously was engaged in customary employment in the usual manner save for pain and slowness of movement occasioned by arthritis during the period in which the disability was claimed and received compensation for his work during that time, was not totally and permanently disabled within the meaning of the policy.

In *Bean v. Travelers' Ins. Co.*, supra, it was held that where an employee was disabled from injuries sustained during employment developed after the termination thereof recovery could not be had under a group policy covering the employee. The court said:

"The plaintiff contends that if an employee covered by group insurance is injured while an employee and terminates his employment and total permanent disability develops after the termination of the employment, recovery may be had under the individual certificate issued as a part of the group life policy. That contention is without merit."

In *Pegues v. Equitable Life Assurance Society of U. S.*, supra, there was involved a policy of life insurance issued to employees of the National Lead Company under the group plan which provided that "the insurance of any employee shall automatically cease and determine on termination of employment * * *" (page 707). The insured became ill while so employed and because of such illness left the employment of the National Lead Company and something over a year thereafter died of said illness. It was held that in the circumstances the beneficiary under the policy could not maintain an action upon it. The condition to the right of recovery was that the decedent be at the time of his death an employee, and he had ceased to be.

As contrasted with the line of cases just referred to, there is another line of cases in which a different and much more liberal construction of policies indemnifying against "total" and "permanent" or "total and presumably permanent" disabilities is adopted. Thus in *Starling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N.W. 340, 62 Am.St. Rep. 709, a case where under the terms of a policy the right to recover depended upon a showing of disability for life such as to prevent the plaintiff from following his

own or any other avocation, a verdict in the plaintiff's favor was upheld, notwithstanding an instruction in which the trial court had said that (page 341):

"The fact that a man may work for a few moments, even though, perhaps, he may work for a few months, will not, necessarily,—it is not conclusive evidence that he can follow some avocation."

In *Prudential Insurance Company of America v. South*, 179 Ga. 653, 177 S.E. 499, 98 A.L.R. 781, where a railway switchman, under the group plan, carried insurance against total disability, which, according to the policy would accrue whenever the insured was (page 500) "rendered wholly, continuously, and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his life", and he met with an accident necessitating the amputation of one arm just below the shoulder, a judgment of nonsuit was reversed. There was evidence that the railway had no use for a one-armed man in the capacity in which the insured had been engaged; that he had earned nothing since his injury and was unable to perform any substantial work of a physical nature and that his education was too meager to render him eligible for any other work. The court said that the words "occupation" and "work" must each be construed according to the facts and circumstances of the execution of the contract, including the objects to be effectuated thereby, and went on to say that:

"Total disability", irrespective of the technical variations in the language employed, should be given a rational and practical construction. The phrase is a relative term, depending upon the circumstances and peculiar facts of each particular case, and is usually a question of fact to be determined by the court or jury trying the case."

The policy in that case had provided that:

"Without prejudice to any other cause of disability, the company will recognize the entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, as total and permanent disability under this policy."

It was stated that the expressions "any occupation" and "any work":

"should be construed to mean the ordinary employment of the particular per-

son insured, or such other employment, if any, approximating the same livelihood, as the insured might fairly be expected to follow, in view of his station, circumstances, and physical and mental capabilities.

* * * If the insured is so incapacitated that substantially all of the material activities of any such employment are reasonably closed to him, he is totally disabled within the meaning of the policy." Citing *Wall v. Continental Casualty Co.*, 111 Mo. App. 504, 86 S.W. 491; *Industrial Mut. Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S.W. 457, 29 L.R.A., N.S., 635, 21 Ann. Cas. 1029; *Hutchinson v. Supreme Tent*, 68 Hun 355, 22 N.Y.S. 801; *Keith v. Chicago, etc., R. Co.*, 82 Neb. 12, 116 N.W. 957, 23 L.R.A., N.S., 352, 130 Am.St.Rep. 655; *Metropolitan Life Ins. Co. v. Bovello*, 56 App.D.C. 275, 12 F.2d 810, 51 A.L.R. 1040; *Cody v. John Hancock Mut. Life Ins. Co.*, 111 W.Va. 518, 163 S.E. 4, 86 A.L.R. 354.

In *Bullard v. Prudential Ins. Co. of America*, 53 Ga.App. 721, 187 S.E. 133, the court said (page 134):

"As appears from the record and the briefs of counsel, the only issue raised in the trial was whether the plaintiff's disability was total and permanent within the meaning of the contract of insurance. The group policy and the plaintiff's certificate declared the total disability payable if the insured employee should become totally and permanently disabled, either physically or mentally, to such an extent that he (or she) was rendered wholly, continuously, and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, etc.

"The evidence showed that the plaintiff, for three years prior to the time of his injury, was engaged in the occupation of a weaver in a cotton mill; that this work required incessant walking and standing; that after being injured he could no longer do the work and the bleachery company refused to re-employ him because of his physical incapacity; that he quit school when he was thirteen years old, having completed the sixth grade, and had no other education; that he was nineteen years old when injured; that of various employments which he had tried since losing his leg, none had afforded him any approximation of what he had earned before that, and all had been of short duration, etc.

"As was held in *Prudential Insurance Co. v. South*, 179 Ga. 653, 177 S.E. 499, 98 A.L.R. 781, the test is the insured's inability 'to pursue his ordinary work or any work of like productivity'. Whether this condition existed, notwithstanding the insured may have worked or have been able to work after the accident, is in this case a question for the jury.

"The evidence therefore presented an issue of fact as respects the totality of the disability, and authorized a verdict for the plaintiff."

In *Temples v. Prudential Ins. Co. of America*, 18 Tenn.App. 506, 79 S.W.2d 608, one Temples, an uneducated man, was employed by a railway as boilermaker's helper and insured under a group policy against total and permanent disability. While in the course of his work he sustained a rupture but continued on his job until for other reasons discharged and afterward worked in a restaurant, operated a filling station, and acted as a night watchman. In sustaining a judgment based upon the verdict of a jury in his favor the court held the question of liability one upon which a jury might legitimately pass and said that total disability and permanent disability are issues of fact to be determined on the evidence adduced in each individual case, and went on as follows (page 611):

"The phrase 'total disability' has a well-understood meaning in the law of insurance. It does not mean a state of absolute helplessness. The decisions, almost without conflict, define that condition as an inability to do the material acts necessary to the prosecution of insured's business or occupation (and substantially all the material acts) in (substantially) his usual or customary manner. Cases so holding are too numerous to be set out. They are cited and quoted in 14 R.C.L. 1315, 1 C.J. 462, and Notes, 51 A.L.R. 1048, 41 A.L.R. 1376, 37 A.L.R. 151, 24 A.L.R. 203.

"One may still be described as totally disabled, although he is able at intervals to perform certain acts in connection with the former occupation or calling that he pursued. *Pacific Mutual Life Ins. Co. v. McCrary*, 161 Tenn. 389, 392, 32 S.W.2d 1052, 1053. * * *

"The fact that the insured may do some work or transact some business duties during the time for which he claims indemnity for total disability or even the fact that he may be physically able to do so is not conclusive evidence that his disability is not

total, if reasonable care and prudence required that he desist. *Fitzgerald v. Globe Indemnity Co.*, 84 Cal.App. 689, 258 P. 458, 462; *New York Life Insurance Co. v. McLean*, 218 Ala. 401, 118 So. 753; *Harrison v. Provident Life & Accident Insurance Co.*, 167 Tenn. 394, 70 S.W.2d 24."

In *Pacific Mutual Life Insurance Co. of California v. Ringold*, 5 Cir., 47 F.2d 738, Ringold held a policy insuring him against permanent total disability in which it was provided that (page 739):

"Permanent total disability as used herein shall be construed to mean that there is neither then nor will be at any time hereafter any work, occupation, or profession that the insured can ever sufficiently do or follow to earn or obtain wages, compensation or profit."

Without stating the facts in detail it was laid down that:

"It is enough to say that the evidence persuasively showed the health of the insured to have been so bad that he was largely unable to work at all and was never in a condition to work, except at the expense of impairment of his health, and with the result of attendant pain and suffering that he could not have been expected to endure, and at the serious risk of the shortening of his life."

It was *inter alia* said that:

"The test * * * depends upon permanent total disability, defined to mean inability to ever sufficiently do or follow, to earn or obtain wages, compensation, or profit, any work, occupation, or profession; and not upon an actual so engaging by an insured, while he was permanently and totally disabled."

In *New York Life Ins. Co. v. McLean*, 218 Ala. 401, 118 So. 753, it was said (page 754):

"If the insured's physical condition, as a result of the disease, is such that common care and prudence requires that he desist from transacting business, and his condition is presumably permanent and continuous, he is permanently and totally disabled, within the meaning of the contract, though he may not be physically disabled to perform occasional acts connected with his business, profession, or occupation."

In *Equitable Life Assurance Society of U. S. v. Watts*, 230 Ala. 297, 160 So. 713, the benefit sued for was under the terms of the policy payable:

"In the event that any employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement."

The court said:

"The mere fact that, when not suffering an acute attack of asthma, he could and did, up to the time of trial, perform some such work, would not justify an affirmative instruction for the defendant. If work is accompanied by suffering, aggravation of a chronic disease, in such sort that sound medical advice says not to work, the fact that there is still strength to do it at times, and, under stress of circumstances he does so perform, will not defeat his right to the total permanent disability benefit under stipulations here presented. *New York Life Ins. Co. v. Torrance*, 228 Ala. 286, 153 So. 463; *Id.*, 224 Ala. 614, 141 So. 547; *Equitable Life Assurance Soc. v. Dorriety*, [229 Ala. 352], 157 So. 59; *Metropolitan Life Ins. Co. v. Blue*, 222 Ala. 665, 133 So. 707, 79 A.L.R. 852; *United States Casualty Co. v. Perryman*, 203 Ala. 212, 82 So. 462; *Travelers' Ins. Co. v. Plaster*, 210 Ala. 607, 98 So. 909; *New York Life Ins. Co. v. McLean*, 218 Ala. 401, 118 So. 753."

As between the opposed authorities then, of which the foregoing are but examples, by no means exhausting the list on either side, on the one hand demanding practical helplessness as the test of total disability, and on the other tending to make the test whether or not in the exercise of reasonable care one can pursue a gainful occupation with a fair degree of continuity, it remains to inquire what the decisions in this state have to say. *Fitzgerald v. Globe Indemnity Co. of New York*, 84 Cal.App. 689, 258 P. 458, was a case where a physician and surgeon, also incidentally engaged in the business of walnut growing, which he superintended in a general way, had a health and accident policy insuring him in different amounts against various degrees of disability in his occupation and also against "total and continuous disability to transact all business duties." He contracted Bright's disease which made it dangerous for him to do anything requiring any great

degree of physical exercise or mental application. He abstained from trying to practice medicine and surgery and left most of the conduct of his walnut growing to subordinates but did from time to time visit his ranches, receive reports and go over statements, though this activity worried him. He drove his automobile, did banking, paid his taxes and insurance premiums and handled some other routine matters. In sustaining a judgment in his favor the court said (pages 697, 698, 258 P. page 461) :

"But to concede that the plaintiff's acts amounted to the transaction of business duties within the meaning of the policy would not require a reversal of the judgment. The ultimate fact to be determined is not what the plaintiff actually did in the way of business duties, but what, in the exercise of common care and prudence, he was reasonably able to do. Proof of what he did is merely evidence tending to show his ability to do, just as the opinions of the physicians who testified are evidence tending to show that his disability was or was not total. This expert opinion evidence alone, in view of the nature of the plaintiff's affliction, is sufficient to create a substantial conflict, and the finding of the trial court thereon is conclusive.

"The weight of authority supports the view that provisions in accident policies for indemnity in the event the insured is totally or wholly disabled do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way.' 41 A.L.R. 1376; 37 A.L.R. 151; 24 A.L.R. 203; L.R. A.1917B, 108; 23 L.R.A.(N.S.) 352; 38 L.R.A. 529; *Joyce on Insurance*, § 3031; *May on Insurance*, 4th Ed., § 522; *Bacon on Life and Accident Insurance*, 4th Ed., § 541. An examination of the cases cited herein shows that the same rule applies in cases of disability caused by disease.

"Appellant concedes 'that perhaps the weight of outside authority is that in the ordinary case where provision is made for total disability alone, the courts will give practical construction to the language employed in order to make the policy operative and to prevent a forfeiture,' but that the same rule does not apply where the policy provides for 'various degrees of disability.' No logical reason appears, however, why

the same rule should not be applied where the policy provides for both total and partial disability in order to make the total disability clause 'operative and to prevent a forfeiture' of the indemnity provided by that clause. In either case a literal interpretation of the total disability clause would defeat the very purpose of insurance against total disability, because it rarely happens that an insured is so completely disabled that he can transact no business duty whatever. The rule quoted has been applied in many cases where the policy in suit provided for both total and partial disability. *United States Casualty Co. v. Perryman*, 203 Ala. 212, 82 So. 462; *Fidelity & Casualty Co. v. Logan*, 191 Ky. 92, 229 S.W. 104; *Bachman v. Travelers' Ins. Co.*, 78 N.H. 100, 97 A. 223; *Fidelity & Casualty Co. v. Joiner* (Tex.Civ.App.) 178 S.W. 806; *Hefner v. Fidelity & Casualty Co.* (Tex.Civ.App.) 160 S.W. 330; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Tex.Civ.App.) 185 S.W. 979; *North American Accident Ins. Co. v. Miller* (Tex.Civ.App.) 193 S.W. 750; *Clarke v. Travelers' Ins. Co.*, 94 Vt. 383, 111 A. 449; *Jacobs v. Loyal Protective Ins. Co.*, 97 Vt. 516, 124 A. 848. In most of the other cases cited herein it does not appear whether or not the policies therein considered provided for both total and partial disability. The fact that the insured may do some work or transact some business duties during the time for which he claims indemnity for total disability or even the fact that he may be physically able to do so is not conclusive evidence that his disability is not total, if reasonable care and prudence require that he desist. *United States Casualty Co. v. Perryman*, supra; *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S.W. 750; *American Liability Co. v. Bowman*, 65 Ind.App. 109, 114 N.E. 992; *Fidelity & Casualty Co. v. Logan*, supra; *Starling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N.W. 340, 62 Am.St.Rep. 709; *Lobdill v. Laboring Men's Mutual Aid Ass'n*, 69 Minn. 14, 71 N.W. 696, 38 L.R.A. 537, 65 Am.St.Rep. 542; *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N.W. 903, 24 A.L.R. 191; *Bachman v. Travelers' Ins. Co.*, supra; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 P. 16; *Brown v. Missouri State Life Ins. Co.*, 136 S.C. 90, 134 S.E. 224; *Hefner v. Fidelity & Casualty Co.*, supra; *Fidelity & Casualty Co. v. Joiner*, supra; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant*, supra; *North American Accident Ins. Co. v. Miller*, supra; *Metropolitan Casualty*

Ins. Co. v. Edwards (Tex.Civ.App.) 210 S.W. 856; *Clarke v. Travelers' Ins. Co.*, supra; *Jacobs v. Loyal Protective Ins. Co.*, supra; *Starnes v. United States* (D.C.) 13 F.2d 212; *Metropolitan Life Ins. Co. v. Bovello*, 56 App.D.C. 275, 12 F.2d 810 [51 A.L.R. 1040]."

Sherman v. Continental Casualty Co., 103 Cal.App. 518, 284 P. 946, was a case of insurance against loss of time resulting from accident or sickness. A total, though not a permanent disability, was claimed and the stipulated benefit in such a situation was sued for. The plaintiff was an automobile saleswoman and after the accident involved which occurred on July 20, 1926, she engaged in some intermittent activity during the next few months which constituted the period for which disability was claimed. The court said (page 521, 284 P. page 947):

"While there appears to be some conflict in the authorities as to what shall constitute total disability within the meaning of a clause of insurance such as we have here, there is ample authority to be found both in the decisions and the textbooks to the effect that, in order to constitute total disability, it is not necessary that the insured be absolutely helpless, and that an attempt by the insured to perform a few occasional trivial acts relating to the duties of his employment, though in fact he ought not to have made such attempt, does not deprive him of the right to show that he was totally disabled (*Cooley's Briefs on Insurance*, 2d Ed., pp. 5538, 5539, citing *United States Casualty Co. v. Perryman*, 203 Ala. 212, 82 So. 462); it being held sufficient if the injuries are of a character and degree that common care and prudence requires him to desist from his labors so long as it is reasonably necessary to effect a speedy cure. (*Kerr on Insurance*, p. 385; *Joyce on Insurance*, Vol. 4, p. 303; *Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S.W. 507; *Harasymczuk v. Massachusetts Acc. Co.*, 127 Misc. 344, 216 N.Y.S. 97; *Pacific Mutual Life Ins. Co. v. Branham*, 34 Ind.App. 243, 70 N.E. 174; *Booth v. United States Fidelity & Guaranty Co.*, 130 A. 131, 3 N.J.Misc. 735; *American Liability Co. v. Bowman*, 65 Ind.App. 109, 114 N.E. 992; *Jones v. Fidelity & Casualty Co.*, 166 Minn. 100, 207 N.W. 179, 182). In the case last cited in dealing with the question of total disability, it was said:

"Should the insured be penalized because, in total ignorance of the serious character of the injury he had received, he un-

dertook to perform, as best he could, under distressing conditions, some of his professional duties, when he might reasonably not have attempted to do any work at all, and thus, without question, have held the insured liable for loss from disability?"

Other California cases have said in substance that the question of what amounted to total disability was one of fact. *Bochner v. Equitable Life Assurance Society of U. S.*, 4 Cal.App.2d 670, 41 P.2d 365; *Ives v. Prudential Insurance Co.*, 12 Cal.App.2d 306, 55 P.2d 273.

[2, 3] While the facts in the instant case exhibit differences in detail from those involved in *Fitzgerald v. Globe Indemnity Co.* of New York, *supra*, and *Sherman v. Continental Casualty Co.*, *supra*, nevertheless it seems to us that the result here must largely be controlled by the doctrine laid down in those cases; that the test of disability is not what the insured actually did in the effort to perform his duties, but what, in the exercise of due prudence he was reasonably able to do. This was a question of fact on which the trial court's determination, in so far as founded on any substantial evidence, is binding upon us. There is some degree of over-statement in the above-quoted finding VIII as respects the loss of use of respondent's hands. As appears from his testimony quoted in an earlier part of the opinion he does claim that the numbness which he felt "raised" in October, 1934, "out of my feet to my hands"; that it kept getting worse all the time. Elsewhere he states that in that month it was "starting in my right hand". We cannot say, however, that the total picture as given us in said findings VII and VIII of his ailment as of October, 1934, even with this qualification, is insufficient under the rule announced in *Fitzgerald v. Globe Indemnity Co.* of New York and *Sherman v. Continental Casualty Company*, to amount to total and permanent disability.

[4] While the "entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot", are situations which, if shown, must, under the terms of the group insurance, be recognized by appellant insurer as total and permanent disabilities, it is not essential that any of these specified situations occur in order that there be such disability. It is only necessary that some ailment or combination of ailments result in such disability in order to compel recognition that the disability exists.

[5] In fine, we think the evidence sufficient to sustain the trial court in holding that respondent was, within the meaning of the policy, totally and permanently disabled as early as October, 1934. This renders it unnecessary to go into the somewhat difficult questions argued in the briefs concerning the validity of the substitution of policy G-4780 for policy G-1904. The circumstances that respondent did, as above stated, finally accept, on February 25, 1936, his individual certificate 41 under policy G-4780 is not, in our opinion, of any importance. As we have hereinbefore observed, when he received that he had already been in receipt of appellant's letter of February 24, 1936, saying in effect that if he had any valid claim under policy G-1904 it would be recognized, and in the circumstances his receipt of the new certificate must be deemed to have been subject to that understanding. At the time this new certificate 41 was received he had already left the employ of the Milk Producers Association and the new certificate had no other value in his hands than to give him the privilege, within 31 days after the termination of his employment, upon payment of the premium therefor, at the current rates, without evidence of insurability, to take out an ordinary policy of life insurance, which it is not claimed that he ever did, and which privilege would also have existed under the old policy. His receipt of the new certificate could not by any possibility in any way have misled appellant insurer to its detriment, nor have estopped him to assert any right vested in him under policy G-1904.

There remains one other phase of the case to be disposed of. The trial court found the principal amount of the insurance payable to the respondent to be \$2,000. This is necessarily predicated on the theory that the final \$500 was automatically added to the amount theretofore carried as of a date not later than April 15, 1934, which would be three years after the original certificate 95 under policy G-1904 was issued to respondent. We have seen that such increase was not recognized by appellant insurer until December 1, 1934, and that the increase in deductions from respondent's wages for his contribution to the increased premium by reason of the increase in the amount of the policy was first made from his wages for the month of December, 1934, which would be after

the time (October, 1934) as of which we have sustained the trial court in finding that the respondent's total and permanent disability occurred.

[6,7] We are unable to agree with the view taken by the trial court on this phase of the case. While, under the provisions of the policy quoted by us in the early part of this opinion, employees of three years or more of service are entitled to an increase in the amount of their insurance up to \$2,000, yet by a further provision there quoted such increase only takes effect "on anniversary date of insurance contract". The anniversary date of the master policy was December 21. This date had been fixed upon long before respondent became a party to the arrangement. In behalf of respondent it is urged that, so far as he was concerned, the contract consisted of three elements: (a) the application made by the Milk Producers Association; (b) the master policy G-1904, redated as of December 21, 1926; and (c) respondent's accession thereto evidenced by his written consent as of April 15, 1931, that deductions for contributions toward premium payments should be made from his wages, and that, therefore, it should be deemed as to him to have sprung into existence as of April 15, 1931; and that April 15 should therefore, as to him, be treated as its anniversary date, and accordingly, that as of April 15, 1934, being the first anniversary date after he had completed three years of service, the increase in its amount by the final \$500 automatically occurred. We are in agreement with the contention that the increase when it did occur was automatic. We find no other requirement in the policy that any certificate of such increase be issued than may be deemed to result from the following language carried therein under the general head: "Provisions as to Employee's Certificate and Conversion of Individual Insurance", to-wit:

"The company will issue to the employer for delivery to each person insured under this policy an individual certificate setting

forth the insurance protection to which such person is entitled hereunder and to whom such insurance is payable. * * *

[8] We do not believe that any neglect of appellant insurer to issue a certificate of increase on the date, whatever that may be, when the increase was due, could operate to delay its effectiveness. We cannot agree, however, that the anniversary date of what counsel for respondent refer to as the "entire contract", as it affected respondent, was April 15. It is competent in entering into a contract for the parties, if they so desire, to agree that it shall be dated as of a previous time. That is not precisely what was done here, but respondent did, as of April 15, 1931, agree to participate in the benefits of a policy that already distinctly specified that its anniversary date should be December 21. In our opinion he thereby assented to the use for that purpose of that date. It follows that the anniversary date of the policy next following the expiration of respondent's three years of service was not April 15, 1934, but December 21, 1934, and that the increase in his insurance to \$2,000 could not have become automatically effective until that date. The circumstance that appellant issued a certificate recognizing the increase as having occurred on December 1, 1934, could not, at the most, estop it to deny that the increase occurred at a date earlier than that. It appears inevitably to follow that the respondent was not protected by the final \$500 of insurance in October, 1934, when he is found to have been totally and permanently disabled.

The judgment is therefore modified by reducing the amount awarded by way of principal of the insurance from \$2,000 to \$1,500, the same to bear interest as originally provided, from February 16, 1936. As so modified the judgment is affirmed, the parties respectively to pay their own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

11 Cal.2d 427

PACIFIC GREYHOUND LINES v. RAILROAD COMMISSION OF CALIFORNIA.

SOUTHERN PAC. CO. v. SAME.

S. F. 16062, 16063.

Supreme Court of California.

June 27, 1938.

Automobiles ⇐84

The State Railroad Commission's findings, made in exercise of its constitutional and statutory authority in determining whether public convenience and necessity require establishment of proposed co-ordinated rail and stage passenger service, are not subject to judicial review. St.1927, p. 74, § 50¼.

In Bank.

Application by the Pacific Greyhound Lines and the Southern Pacific Company, respectively, for writs to review and annul an order of the Railroad Commission of the State of California for issuance of certificates of public convenience and necessity to the Santa Fé Transportation Company for establishment of a co-ordinated rail and stage passenger service over described routes.

Applications denied.

Guy V. Shoup, Burton Mason, and E. J. Foulds, all of San Francisco, for petitioner Southern Pac. Co.

Brobeck, Phleger & Harrison, H. C. Lucas, and Earl A. Bagby, all of San Francisco, for petitioner Pacific Greyhound Lines.

Ira H. Rowell, Roderick B. Cassidy, and George E. Howard, all of San Francisco, for respondent Railroad Commission.

Charles H. Woods, of Chicago, Ill., Robert Brennan, of Los Angeles, Gerald E. Duffy, of San Francisco, William F. Brooks, of Los Angeles, George W. Lupton, Jr., of Oakland, Jonathan C. Gibson, of Chicago, Ill., and Allan P. Matthew, of San Francisco (McCutchen, Olney, Mannon & Greene, of San Francisco, of counsel), for Santa Fé Transp. Co. and Atchison, T. & S. F. Ry. Co.

PER CURIAM.

On October 3, 1935, the Santa Fé Transportation Company, which is wholly owned and controlled by the Atchison, Topeka and Santa Fé Railway Company, filed cer-

tain applications with the respondent Railroad Commission wherein it sought, among other things, the issuance of certificates of public convenience and necessity authorizing the establishment of a co-ordinated and integrated rail and stage service for the transportation of passengers and their baggage, over four definitely described routes, in intrastate commerce. Among other things, the proposed service contemplated a rate structure of one and one-half cents a mile, the fares to be computed on the short-line mileage, rail or stage, with unlimited stop-over privileges and interchangeability of tickets on rail or stage. Following 146 days of hearing, during which 584 witnesses were examined, 855 exhibits were received and 17,205 pages of testimony were adduced, the respondent commission, all of the members concurring, made its order on April 18, 1938, finding and declaring that public convenience and necessity require the establishment of the proposed passenger service over said four routes and ordering the granting to the Santa Fé Transportation Company the necessary certificates of public convenience and necessity essential to the commencement and establishment of such service.

The petitioners, Pacific Greyhound Lines and Southern Pacific Company, acting separately, instituted the above-entitled proceedings to review and annul the order of the respondent commission. Attached to each petition is a copy of the seventy-four page opinion of the respondent commission wherein the great volume of evidence adduced before it is exhaustively and minutely detailed. Many briefs have been filed herein by those interested wherein the asserted merits and demerits of such opinion and the findings therein contained are respectively extolled and condemned.

Our examination of these several documents has satisfied us that the findings of the respondent commission are based upon and supported by substantial evidence, particularly the findings to the effect that "public convenience and necessity require the operation by Santa Fé Transportation Company, in conjunction with The Atchison, Topeka and Santa Fe Railway, of a coordinated and integrated rail and stage service for the transportation of passengers and their baggage in intrastate commerce in California" over designated routes and that "Greyhound cannot render,

and Greyhound will not render, all or any part of the service proposed by Santa Fé Transportation Company, in its four applications, to the satisfaction of this Commission". This latter finding makes it unnecessary for us to here concern ourselves with the interpretation of section 501 $\frac{1}{4}$ of the Public Utilities Act, St.1915, p. 115, as added by St.1927, p. 74. The findings of the respondent commission made in the exercise of its constitutional and statutory authority in determining whether public convenience and necessity require the establishment of the proposed service are not subject to judicial review. *Oro Electric Corp. v. Railroad Comm.*, 169 Cal. 466, 471, 147 P. 118; *San Diego & Coronado Ferry Co. v. Railroad Comm.*, 210 Cal. 504, 510-513, 292 P. 640; *Southern California Edison Co. v. Railroad Comm.*, 6 Cal.2d 737, 748, 59 P.2d 808. The commission has made no order directly against the petitioners. However, they claim that they are entitled to protection against competition from another, and that the order of the commission will deprive them of their property without due process of law in violation of their rights guaranteed by the Constitution of the United States. The record presented on these applications is sufficient upon which to conclude that the commission has acted within its power and regularly pursued its authority in making the order complained of.

It follows that the applications filed herein for writs of review and annul the above-mentioned order of the respondent commission, should be, and each is, denied.



11 Cal.2d 430

WALLIS et al. v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

S. F. 16002.

Supreme Court of California.

June 28, 1938.

1. Municipal corporations ☞206

Carpenters for electric company who were retained in the employ of the city of Los Angeles after its purchase of the electric company, without being subject to civil serv-

ice law, as authorized by the city's amended charter, would be entitled to pay for services rendered for the city by the carpenters unless there appeared a compelling reason why they should not be paid. St.1925, p. 1069, § 120; St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

2. Pleading ☞214(1)

Allegations of a petition are admitted on demurrer.

3. Municipal corporations ☞206

Carpenters for electric company who were retained in the employ of the city of Los Angeles after its purchase of the electric company, without being subject to civil service law, as authorized by amendment to city charter, had no right of permanency in tenure of their employment except to the extent that the Board of Water and Power Commissioners should elect to continue the carpenters in employment under conditions provided by charter amendment. St.1925, p. 1069, § 120; St.1935, p. 2356, § 431; St. 1937, pp. 2572-2631.

4. Municipal corporations ☞217(1)

The amendment to the charter of the city of Los Angeles relating to the city's retaining in its employ the former employees of a public utility purchased by the city merely conferred power upon the Board of Water and Power Commissioners in its discretion to employ the former employees of a utility purchased by the city, under conditions imposed by the charter amendment. St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

5. Municipal corporations ☞206

Where the Board of Water and Power Commissioners elected to retain former carpenters for electric company, in the employ of the city of Los Angeles after its purchase of electric company, as authorized by amendment to city charter, the carpenters were exempt from all civil service provisions of the charter including any rule adopted by the civil service commissioners pursuant to civil service provisions of the charter. St. 1925, p. 1069, § 120; St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

6. Municipal corporations ☞216(1)

The purpose and intent of the exemption contained in amendment to charter of the city of Los Angeles which authorized city to retain in its employ the former employees of any utility purchased by the city, and exempted such employees from the civil service law, was to render the employees of

the utility exempt from civil service only in event that they were continuously retained and employed by the city. St.1925, p. 1069, § 120; St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

7. Municipal corporations ⇨214(1)

The people of the city of Los Angeles through amendment to the city charter had the power to authorize the city to retain former employees of public utilities purchased by the city, and to exempt them from the provisions of the civil service provisions of the charter of the city of Los Angeles. St. 1925, p. 1069, § 120; St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

8. Municipal corporations ⇨206

Carpenters for electric company who were retained in the employ of the city of Los Angeles after its purchase of the electric company, without being subject to city's civil service law, as authorized by city's amended charter, were entitled to pay for services rendered for the city by the carpenters. St. 1925, p. 1069, § 120; St.1935, p. 2356, § 431; St.1937, pp. 2572-2631.

EDMONDS, J., dissenting.

In Bank.

Original proceeding in mandamus by Albert Wallis and another against the Board of Civil Service Commissioners of the City of Los Angeles and others to compel the respondents who were officers of the City of Los Angeles to approve and audit the pay roll of the Department of Water and Power of the City in so far as it affected the petitioners and to cause to be paid to the petitioners compensation for services rendered as carpenters in the Department of Water and Power.

Peremptory writ issued as prayed.

Haas & Home, of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., and John Beardsley, Deputy City Atty., all of Los Angeles, for respondent Board of Civil Service Commissioners of City of Los Angeles.

Arthur C. Fisher, of Los Angeles, for Civil Service employees.

SHENK, Justice.

This is an original proceeding in mandamus to compel the respondent officers of the city of Los Angeles to approve and audit the payroll of the department of water and power of the city of Los Angeles in so

far as it affects the petitioners, and cause to be paid to them the sum of \$72 each or account of compensation for services rendered as carpenters in said department for the first half of February, 1938. As the return to the alternative writ is a general demurrer to the petition, the facts are undisputed.

For many years the Los Angeles Gas and Electric Company, a public utility corporation, owned and operated an extensive distributing system for furnishing electricity to the residents of the city of Los Angeles for domestic and commercial purposes. This distributing system was maintained and operated by the company for many years before the establishment by the city of Los Angeles of its municipally owned electrical system under the charge, supervision and control of the board of public service commissioners of said city. After the establishment of the city's system the businesses of the two systems were in competition in the city and the question of the acquisition by the city of the electrical distributing system of the public utility corporation was a matter of frequent if not constant discussion and agitation. Numerous controversies of considerable moment had developed and were pending at the time of the submission by the city council to the voters of the city of a series of elaborate amendments to the freeholders' charter of the city designed to accomplish the settlement of all the controversies between the corporation and the city and the purchase by the city of the corporation's electrical distribution system and plants for a base price of \$46,340,000. The proposed charter amendments were ratified by the voters of the city at an election held for that purpose on December 8, 1936, and were approved by the legislature on January 8, 1937. Stats. 1937, pp. 2572-2631. Theretofore, in 1935, and in anticipation of the acquisition of the utility property by the city, the city charter had been amended by adding section 431, reading as follows: "Sec. 431. All persons employed in the operating service of any public utility hereafter acquired by the city, or any department thereof, at, and for at least one year immediately prior to, the date of such acquisition, may be retained and employed by the city, or such department, in their respective positions, as nearly as may be, and, so long as continuously so retained and employed in such positions, shall be exempt from the civil service provisions of this charter; provided, however, that no person not a citizen of the United States,

shall be so retained and employed and that persons so retained and employed shall, within three months after such acquisition, conform to any residence requirements applicable to employees of said city, or department, in like positions." Stats.1935, p. 2356.

It is apparent from the allegations of the petition that during the campaign for and against the charter amendments to be voted on at the election of December 8, 1936, the question became acute as to what would be the fate of the employees of the public utility corporation with reference to their employment in the event the charter amendments be adopted and the employment of the corporation's employees be terminated upon the acquisition by the city of the electrical distributing system. To meet this situation, and prior to the election of December 8th, the board of water and power commissioners adopted and made public the following resolution:

"Whereas, it is contemplated that a charter amendment will be submitted to the voters of the City on December 8, 1936, which provides, among other things for the purchase of the electric system of the Los Angeles Gas and Electric Corporation by the City of Los Angeles through the Department of Water and Power; and

"Whereas, it is provided by section 431 of the Charter of the City of Los Angeles that all persons employed in the operating service of any public utility hereafter acquired by the city, or any department thereof, at, and for at least one year immediately prior to, the date of such acquisition, may be retained and employed by the city, or such department, in their respective positions, as nearly as may be, and, so long as continuously so retained and employed in such positions, shall be exempt from the civil service provisions of the charter, subject to the provision that no person not a citizen of the United States shall be so retained and employed, and that all persons so retained and employed shall, within three months after such acquisition, conform to any residence requirements applicable to employees of said city, or department, in like positions; and

"Whereas, it appears desirable that this Board should define its policy with reference to the employment of persons who at the time of the acquisition of said electric system, if consummated, may be employed by said Corporation, and whose employ-

ment by said corporation may be terminated by such acquisition; and

"Whereas, the Chief Electrical Engineer and General Manager has reported to this Board that after a careful survey of the work of the Department and of the system and organization of the Corporation it appears that substantially all of the employees regularly employed in the operating service of said Corporation, and devoting their time to the work of the electrical division of said Corporation, will be required in addition to the regular employees of the Department in the operating service of the consolidated system;

"Now, therefore, be it resolved that it is the sense and intention of this Board that upon such acquisition this Board should and will exercise the power granted to it by said section, in accordance with said report."

[1] Following the favorable vote on the charter amendments and the acquisition of the electrical distributing system of the Los Angeles Gas and Electric Company, and in order to carry out in good faith the purpose and intent of section 431 of the charter and the foregoing resolution, the board of water and power commissioners employed certain persons who had formerly been employed in the operating service of the utility for at least one year immediately prior to the acquisition of the utility's property by the city and were otherwise qualified to continue in service, and elected to retain them in their respective positions. They were continuously so retained and were, by appropriate order of the commission, ordered paid for their services. It is clear that they should be so paid unless the record discloses a compelling reason why they should not.

Section 120 of the charter, St.1925, p. 1069, provides that the controller shall not approve any salary or compensation for services to any person holding or performing the duties of a position in the classified civil service, unless the payroll for such compensation bear the certificate of the board that the person named has been employed in accordance with the civil service provisions of the charter and the rules established thereunder and the payroll be approved by the civil service commissioners.

The payroll, including the petitioners' compensation, was certified by the board of

water and power commissioners in all respects as required by the rules governing that board, but the civil service commissioners refused to approve the same, basing their refusal on the requirements of rule XVIII, section 15, adopted by the civil service commissioners prior to the enactment of section 431 of the charter in 1935. The rule reads as follows: "Where exempt or non-Civil Service employees and classified employees are performing work of the same grade and class within a department and a suspension for lack of work, lack of funds or abolishment of position is to be made, no Civil Service employee may be suspended until all such exempt persons are laid off."

[2] It is alleged in the petition and is therefore admitted that the petitioners were employed by the public utility corporation in carpentry and similar work for one year prior to the acquisition of the distributing system by the city and that they were continuously employed by the city in that work after such acquisition. It is also alleged and admitted that during the period in which the petitioners performed the work for which they are demanding payment there were persons on the civil service list of the city as carpenters, certified to the department of water and power, and in the same classification as the petitioners, who had been laid off by the department for lack of work while the petitioners were retained as carpenters.

[3-5] The question presented is the scope to be accorded the exemption from civil service provisions of the charter as provided by section 431 of the city charter. The question does not involve the right of the petitioners as former employees of the utility to permanency in tenure of their employment, for clearly they have no such right except to the extent that the employer, the board of water and power commissioners, elects to continue them in employment under the prerequisite conditions provided by section 431, which conditions are here present. The provisions of that section merely confer the power on that board, in its discretion to employ former employees of the utility under those con-

ditions. When the conditions are present, as here, and the employing board has elected to exercise that power, the persons employed are exempt from all the civil service provisions of the charter, which would necessarily include any rule adopted by the civil service commissioners pursuant to the civil service provisions of the charter. To hold otherwise would be to accord greater force to the rule than to the charter itself and to nullify the latter.

[6,7] The clear purpose and intent of the exemption contained in section 431 of the charter and the action of the board thereunder was to render the employees of the department, situated as we find the petitioners, exempt from civil service only in the event that they are "continuously so retained and employed". The board may discharge or suspend such employees at its pleasure. The civil service rule would force a suspension contrary to the charter power to continue them in service. Such suspension under the preference rule of the civil service commission is entirely inconsistent with the continuity of service required by the charter in order that the petitioners have any standing at all as employees of the department. Such a limited and restricted exemption probably does not obtain with reference to any other employees of the city exempt from civil service. It is a special provision applicable to the class to which the petitioners belong. The people of the city have so provided in their charter and there can be no question of their power so to do.

[8] The duty of the respondents to certify, audit and pay the warrants drawn by the board of water and power commissioners for the payment of the compensation of the petitioners has been sufficiently shown.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; HOUSER, J.; LANGDON, J.

I dissent: EDMONDS, J.

For dissenting opinion see 81 P.2d 428.

In re JUNG.*

S. F. 15835.

Supreme Court of California.

July 5, 1938.

Rehearing Granted August 4, 1938.

Attorney and client ☞53(2)

Evidence warranted revocation of attorney's license to practice law on ground of falsity, concealment, and bad faith on part of attorney in connection with filing of application for admission to practice, in that he made false answers to certain questions in his sworn application for admission, misrepresenting matters and concealing facts material to proper determination of attorney's moral character.

LANGDON and HOUSER, JJ., dissenting.

In Bank.

Proceedings by the State Bar to revoke the license of Charles Joe Jung, a member of the State Bar.

License revoked.

Philbrick McCoy, of Los Angeles, for petitioner State Bar of California.

Charles Joe Jung, in pro. per., I. M. Peckham, of San Francisco, for respondent.

WASTE, Chief Justice.

This proceeding was instituted by the State Bar to revoke the license of the respondent Charles Joe Jung to practice law in all the courts of this state on the ground that it was obtained through misrepresentation and concealment in that respondent made false answers to several material questions in his sworn application for admission to practice. Respondent was thereupon directed to show cause before this court why the order admitting him to practice law should not be revoked. Thereafter he demurred and answered and the matter was referred to a referee to receive evidence, make findings and file a report. Both sides have filed exceptions to the referee's findings and report and the matter now comes before us on the evidence adduced before the referee and the briefs of the parties.

It appears that in June, 1936, the respondent filed with the committee of bar examiners his sworn application in writing to take the examination for admission to the bar of this state. Subsequently, he passed the examination and, upon motion of the

committee, was admitted to the practice of the law by this court on October 21, 1936. In its petition herein to revoke the order so admitting him to practice, the State Bar alleges that respondent by making false answers to certain questions in his sworn application for admission misrepresented certain matters and concealed certain facts material to a proper determination of his moral character.

Specifically, it is charged that in answering question 14 relative to his previous business or occupation, respondent said that he had been employed as an interpreter in the United States immigration service and then, as reason for the termination of the employment, stated: "(4) (Non-civil service, Political Appointment) Position discontinued in March, 1933." In question 16 respondent was asked: "Have you ever been reprimanded, censured, or otherwise disciplined as an attorney or member of any profession or organization, or holder of any office, or have any charges ever been made or filed or proceedings instituted against you?" Respondent's answer thereto was "No." In reply to question 17 as to whether he had "ever been charged with fraud, either formally or informally", respondent likewise answered "No."

In effect, it is the State Bar's theory that respondent's answers to said three questions were false in that he deliberately withheld information relative to his dismissal "with prejudice" by the immigration department following an investigation of a complaint received by that department having to do with asserted misconduct on his part as an interpreter. A reading of the transcript herein discloses that on November 28, 1932, the central immigration office in Washington requested the San Francisco office, where respondent was employed, to investigate a complaint from the Florida office apparently charging respondent with having taken money to effect the entry of an alien Chinese. Accordingly, an investigation was first made at Jacksonville, Florida, the source of the complaint and the location of the informer. When that investigation was completed to the satisfaction of the officer in charge, respondent was directed by said officer to report at the Angel Island station. The officer testified in this proceeding that he thereupon informed respondent that "he was charged with certain derelictions and malfeasance in office", that respondent was given "specifications of the elements of malfeasance with which

*For subsequent opinion see 88 P.2d 679.

he was charged"; that respondent was then sworn and under oath made a statement denying the charges against him, stating, in substance, that "from what had transpired it was his understanding he was under charges by a certain individual for taking money in order to effect the admission of an alien Chinese. He disclaimed all knowledge concerning the matter; disclaimed all activities in connection therewith; referred to his previous record and asserted that the charges were not true, and said that from the evidence, so far as he knew, there was no cause why he should be discharged from his position. He stated that the statements which he had made were all under oath, and that he fully understood the position which existed at that time. This statement that Mr. Jung understood his answers were made under oath was in addition to his being sworn. He was sworn before the statement was commenced. That was the material part of his comment."

The record also discloses that less than three months after the commencement of this investigation, respondent was informed by letter from the local office and by a second letter from the department of labor in Washington of the termination of his employment, the latter letter stating that "upon the recommendation of the Commissioner-General of Immigration, your services as Chinese interpreter * * * have been discontinued with prejudice * * *."

Because of restrictions of a confidential character which surround the records of the immigration department and preclude them from public scrutiny, they are not now before us. However, sufficient may be gleaned from the testimony herein of respondent's former superiors in the department, and from respondent's own testimony, to indicate that he was, in fact, informed against for assertedly taking money to effect the entry of an alien Chinese, that an investigation of the complaint followed and that he was within three months thereafter dismissed from the service "with prejudice". In this proceeding, it is not our function to determine the regularity, propriety or sufficiency of the proof addressed to the complaint made against respondent with the department of immigration. It is our sole problem to here determine the propriety of respondent's conduct in failing to disclose the above mentioned matter in his sworn application for admission to practice. We find nothing in the record to support respondent's attempted explanation

of his silence with respect thereto other than his own statement that he believed his "non-civil service, political appointment" as interpreter had been "discontinued". In elaboration thereof he testified in this proceeding that he received the two letters of dismissal after the death of the person or superior officer by whom he was appointed and that he "thought that when the boss go out as political appointee I go out with him. That is why I think they did away with my position." This attempted explanation loses sight of the fact that it was *after* the death of his superior officer that respondent was questioned about and made a denial of the complaint then under investigation. His explanation taxes credulity and finds support only in his own statements.

Contrary to the referee's finding herein, we cannot agree that the testimony of the two immigration officials, called herein as witnesses by The State Bar, is inconclusive and unsatisfactory. True, as stated their production of department records for examination was prohibited under advice of an assistant United States District Attorney, but it clearly and positively appears from their testimony that a complaint was made as to respondent's conduct as interpreter, that an investigation was had, that respondent was fully informed as to the matter and permitted to make a statement thereon and was thereafter and within three months dismissed from the service "with prejudice". Nor can we accept the finding of the referee that respondent did not know the exact meaning of the words "with prejudice" employed in connection with his dismissal. Certainly, it is not unreasonable to conclude that respondent might well have been expected to find explanation or meaning for his dismissal "with prejudice" in the investigation that preceded such dismissal by less than three months. His answer herein concedes as much for he alleges "that respondent suspected * * * that there was some connection between the complaint and the abolishing of his job".

On the record before us, and contrary to the referee's finding, we find and conclude that the charges of falsity, concealment and bad faith on the part of respondent in connection with the filing of his application for admission to practice, are fully sustained and warrant a revocation of the license heretofore issued to him. Other particulars wherein we differ with the referee, need not be mentioned.

Respondent's motions to strike the testimony given herein by the two immigration officials and to dismiss this proceeding, lack merit and are, and each is, denied.

It is ordered that the license heretofore issued to Charles Joe Jung to practice law in all the courts of this state be revoked and that his name be stricken from the roll of attorneys.

We concur: SEAWELL, J.; SHENK, J.; EDMONDS, J.

LANGDON, Justice (dissenting).

I am in accord with the findings and recommendations of the referee, B. Grant Taylor, appointed by this court, that the above entitled proceedings should be dismissed.

I concur: HOUSER, J.



11 Cal.2d 479

RUTHERFORD v. RIDEOUT BANK et al.
Sac. 4999.

Supreme Court of California.

June 30, 1938.

Rehearing Denied July 28, 1938.

1. Banks and banking ☞112

The manager of branch bank had duty to discuss with bank's debtors the action that the bank would take with respect to funds owed it and mortgages securing such sums, and to discuss generally with debtors the condition of the business in which, as creditor, the bank had an interest and the measures which the bank would approve as tending to protect its securities, especially where successive branch managers undertook to give bank's debtors advice in the management of business affairs in which bank had an interest as creditor, and bank would be liable for advice of bank's manager fraudulently given.

2. Principal and agent ☞158

The principal who puts an agent in position that enables the agent while apparently acting within his authority to commit a fraud upon third persons is subject to liability to defrauded persons, even if the principal is entirely innocent and receives no benefit from the transaction, and the agent acts solely for his own purposes.

3. Principal and agent ☞158

The liability of a principal who puts an agent in position that enables the agent while apparently acting within scope of his authority to commit a fraud upon a third person, to the person defrauded, is based upon the fact that the agent's position facilitates the consummation of the fraud, since, from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business confided to him.

4. Banks and banking ☞112

A bank whose branch manager induced bank's customer to sell land at an inadequate price by falsely informing customer that, if she did not sell, holders of trust deeds would foreclose trust deeds on the land and the bank would foreclose mortgage on other lands of the customers, was liable for the fraud of the manager, even though the bank knew nothing of the fraudulent representations which the manager made in furtherance of his personal interest.

5. Limitation of actions ☞100(13)

A court will not lightly seize upon a small circumstance to deny relief to a defrauded party on ground that the defrauded party did not discover the fact that he had been defrauded as soon as he might have done and that his action is barred by limitations, and only where the defrauded party plainly should have discovered the fraud except for his inexcusable inattention will he be charged with discovery of the fraud in advance of actual knowledge. Code Civ. Proc. § 338, subd. 4.

6. Limitation of actions ☞100(13)

Where branch bank manager induced bank's customer to sell land to third party for an inadequate price by fraudulently representing that, if customer did not sell, trust deed holders would foreclose on the land and bank would foreclose mortgage on other lands, the fact that the customer could have discovered inadequacy of price paid for her land by inquiry did not put her on notice of the fraud, so as to commence the running of limitations before actual discovery of the fraud, in view of customer's belief in the representations of the manager in whom the customer had implicit trust and confidence. Code Civ. Proc. § 338, subd. 4.

7. Limitation of actions ☞100(13)

An action by bank's customer for fraud committed by bank's branch manager who induced the customer to sell land to third

party for an inadequate price by falsely representing that, if customer did not sell trust deed, holders would foreclose on the land and bank would foreclose mortgage on other land was not barred by limitation, where it was brought within three years of actual discovery of the fraud by the customer, who was not chargeable with what she would have discovered if inquiry were made, prior to actual discovery of the fraud, in view of confidential relation between bank and customer who relied on advice of the bank's branch manager. Code Civ.Proc. § 338, subd. 4.

8. Limitation of actions ⇨179(2)

In action against bank for damages for fraud allegedly committed by branch manager of bank who induced customer to sell land at inadequate price, the complaint which alleged the false representation by the manager and the discovery of the fraud was sufficient to sustain a finding on issue of statute of limitations in absence of special demurrer challenging alleged defects existing because complaint did not show that fraud was committed under such circumstances that customer would not be presumed to have any knowledge of it prior to actual knowledge. Code Civ.Proc. § 338, subd. 4.

9. Limitation of actions ⇨201

A finding that bank's customer did not discover fraud and had no cause to suspicion that fraud had been practiced upon her until a date within two months before action for fraud was brought and finding of confidential relationship between customer and bank was equivalent to finding that action was not barred by limitation and was sufficient finding on that issue. Code Civ.Proc. § 338, subd. 4.

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Mary A. Rutherford against the Rideout Bank and others for fraud. From an adverse judgment, the defendant Bank of America National Trust & Savings Association appeals.

Affirmed.

Prior opinion, 75 P.2d 101.

Louis Ferrari and C. H. White, both of San Francisco, George F. Jones, of Oroville, and Keyes & Erskine, of San Francisco, for appellant.

Rich, Weis & Carlin, of Marysville, for Robert J. Finnie.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

PER CURIAM.

This case was taken over by this court on petition for hearing after decision by the District Court of Appeal for the Third Appellate District. The action is brought against Robert J. Finnie and the Bank of America National Trust and Savings Association as the successor of the Rideout Bank to recover damages for fraud. A judgment for damages in the sum of \$12,880 was recovered in the lower court. From this judgment the defendant bank alone appeals.

The trial court found, in accordance with the allegations of the amended complaint, that, in December, 1920, at the time of the commission of the alleged fraud, and for some years prior thereto, the plaintiff, Mrs. Rutherford, owned two parcels of real property known as the Rutherford Ranch and the Home Place; that the former was subject to a deed of trust for \$30,000, not held by the bank, and the latter subject to a mortgage held by the bank in the sum of \$8,000; that the plaintiff's husband died in April, 1923, and that during the time of her husband's incompetency (upon which the court made no specific finding) Mrs. Rutherford undertook the care and management of the ranch property; that she was inexperienced and unfamiliar with such matters; that she was a depositor of the Rideout Bank and constantly and continuously consulted with the Rideout Bank in the management and care of her business and financial affairs; that she wholly and exclusively relied upon the bank and that the bank accepted her confidence and advised and counselled her during the periods alleged and that there existed during this time a confidential relation between the bank and the plaintiff upon which the plaintiff implicitly relied and acted in the transaction of her business and financial affairs. It was further found that, on December 27, 1920, the plaintiff executed a document known as the Finnie agreement and later, in compliance with it, executed and delivered to Finnie a grant deed of the Rutherford Ranch; that, prior to and at the time of the execution of the Finnie agreement, both the indebtedness secured by the trust deed on the Rutherford Ranch

and that secured by the mortgage on the Home Place were overdue and unpaid; that the plaintiff was unable to pay either indebtedness; that all these facts were known to Finnie, the Rideout Bank and to Taylor, its manager; that, with fraudulent intent to induce the plaintiff to execute the Finnie agreement and deed, the Rideout Bank, through its manager, Taylor, falsely and fraudulently represented to plaintiff as a fact and by way of counsel that if she did not execute the Finnie agreement and deed selling the Rutherford Ranch to Finnie, the bank would foreclose the mortgage of the Home Place and the holders of the trust deed on the Rutherford Ranch could and would sell her out under the trust deed and she would lose everything, that it would be better for her to sell the Rutherford Ranch for \$5 an acre, if necessary, and that it was for her best interests to make the sale to Finnie on the terms of the agreement and that the consideration named therein was a fair one; that, relying on this advice of Taylor's, and believing the false representations and counsel, the plaintiff executed the agreement and deed and that if it had not been for the false representations and advice and the plaintiff's implicit belief therein she would not have executed the agreement to sell nor the deed in pursuance thereof. The court further found that all the representations were false and known by Taylor and Finnie to be false and were made for the purpose and with the design of deceiving and defrauding the plaintiff and inducing her to make the sale to Finnie; that the plaintiff received the sum of \$23 an acre for the Rutherford Ranch; that at the time the reasonable market value of the land was \$30 an acre and that the ranch contained 1840 acres.

The plaintiff further alleged and the court found to be true that she continued to rely upon the Rideout Bank and to believe in the truth of the representations and the good faith of the advice until on or about September 15, 1927, at which time she was handed documents evidencing the fact that Finnie paid to Taylor \$2,500 as consideration for making the fraudulent representations and inducing the plaintiff to make the sale of the Rutherford Ranch to Finnie; that, prior thereto, the plaintiff had no reason or occasion to question the truth of Taylor's representations nor the good faith of his advice and that prior to this date the plaintiff had no no-

tice or knowledge of the fraud that had been practiced upon her.

The contentions of the bank are: First, that Taylor, in making the fraudulent representations inducing the sale, was acting beyond the scope of his authority, hence no liability attached to the bank; second, that if a cause of action existed against the bank it was barred by the statute of limitations (Code of Civ.Proc., sec. 338, subdiv. 4); and, third, that the court failed to find upon a material issue raised by the answer, whether the statute of limitations was a bar to the action, hence the judgment is not supported by the findings and must be reversed for a new trial unless this court will exercise the power of making findings given it by section 956a of the Code of Civil Procedure.

As to the first question, the plaintiff and the bank agree upon the applicable principle of law but the plaintiff contends that at the time of making the fraudulent representations Taylor was acting within the scope of his authority as manager of the Gridley branch of the Rideout Bank while the bank argues that he was engaged in inducing the plaintiff to sell her property for an independent purpose of Finnie's and his own, that he was not authorized to engage in such transactions and hence the bank cannot be held liable.

[1] It cannot be gainsaid that Taylor made a fraudulent use of the authority conferred upon him by the bank. Acting in the line of his known powers, he falsely and fraudulently represented to the plaintiff that unless she made the sale to Finnie the bank would foreclose its mortgage on the property known as the Home Place. That it was within Taylor's duties as manager of that branch of the bank to discuss with its debtors the action which the bank proposed to take with respect to sums owed it and encumbrances securing such sums is clear. And we are of the view that it was also within the line of his duties to discuss generally with debtors the condition of the business in which, as a creditor, the bank had an interest and the measures which the bank would approve as tending to protect its security. Especially is this so where the successive managers have, in their official capacities, undertaken to give advice in the management of business affairs in which the bank has an interest as creditor. The bank must therefore be liable for such

advice when fraudulently given. The rule is clearly stated in the Restatement of the Law of Agency, sections 261 and 262.

[2] Section 261: "A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third person for the fraud."

[3] The illustrations and the comment found under these two sections are convincing. Under section 261 it is said: "The principal is subject to liability under the rule stated in this section although he is entirely innocent, although he has received no benefit from the transaction, and, as stated in section 262, although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him."

[4] The Restatement of the Law of Agency has been generally endorsed by this court in *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, and the particular principles announced in sections 261 and 262 have been applied by this court in *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280 (followed in *Pacific Postal Tel. Co. v. Bank of Palo Alto*, 9 Cir., 109 F. 369, 54 L.R.A. 711); *Otis Elev. Co. v. First Nat. Bank*, 163 Cal. 31, 124 P. 704, 41 L.R.A., N.S., 529, and *National Bank of San Mateo v. Whitney*, 181 Cal. 202, 183 P. 789, 8 A.L.R. 298. See, also, *Blair v. Guarantee Title Co., Inc.*, 103 Cal.App. 260, 284 P. 719; *Ross v. Prudential Guar. Bldg., etc., Ass'n*, 140 Cal. App. 148, 35 P.2d 176; *Mitchell Street State Bank v. Schaefer*, 169 Wis. 543, 173 N.W. 330, and *National City Bank v. Carter*, 6 Cir., 14 F.2d 940. In the last cited case the federal court said (page 942): "Huntley was bribed so to conduct himself as vice president as to aid in defrauding the depositor. We think the bank cannot escape liability, in a suit where the jury accepts this theory of fact." This language applies with equal strength to the present situation. Taylor was bribed so to conduct himself as manager of the branch bank as to aid in defrauding a depositor and a debtor. Taylor's position as manager conferred upon him potential

power which he could and did use in a coercive manner in accomplishing a wrongful act under color of the office which he occupied. The result would be the same whether he kept the money for his personal use or turned it over to the bank, provided the plaintiff was damaged by the fraudulent act of the bank's officer. It is true that the acts of the manager were not authorized by the bank and it was innocent of wrong doing in a moral sense, but the situation is not different from the unfortunate losses which sometimes result from the dishonest acts of agents to which the principal, as such, was not a corrupt party. The appellant objects that such a rule imposes too great a burden on banking institutions. However, the conclusions we have reached herein impose no liability for advice honestly though mistakenly given. They merely make actionable dishonest or fraudulent acts committed ostensibly under sanction of the bank.

Miller v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 1 Cal.App.2d 470, 36 P.2d 1088, is difficult to reconcile with the cases cited and the views expressed above and in so far as it is inconsistent therewith it is disapproved.

The fraud was committed in December, 1920, and this action was begun in November, 1927. Subdivision 4 of section 338 of the Code of Civil Procedure requires action to be brought within three years of the discovery of the fraud. The appellant contends that the plaintiff has failed either by pleading or proof to show that the fraud was not discovered until within three years of the bringing of the action. The complaint expressly alleges and the court found that the plaintiff had no knowledge of the fraud and no reason to suspect that a fraud had been perpetrated upon her until September 15, 1927, when there came to her hands documents evidencing the corrupt bargain of Taylor and Finnie. The record sustains this finding. It is, however, the contention of the appellant that the fraud was open and patent, that, since the slightest inquiry would have disclosed the truth, nothing but the plaintiff's inexcusable negligence kept her so long in ignorance of the fact that she had not received a fair price for her property, and finally, the additional fact, which came to light in September, 1927, was not one of the facts constituting the fraud but merely Taylor's motive for committing it.

[5-7] The rule is clearly stated in *Victor Oil Co. v. Drum*, 184 Cal. 226, 241, 193 P. 243, 249: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part." The appellant argues that the slightest inquiry would have disclosed the difference between the value of the ranch and the price offered by Finnie, the fact that the holders of the trust deed were not on the point of foreclosing and that Taylor's representations as to the bank's similar intentions were false. It is true that the plaintiff could have discovered the inadequacy of the price by inquiry but this alone would not necessarily have been sufficient to warn her of the fraud in the light of her belief in the representation, by one in whom she had implicit trust and confidence, that it was for her best interest to make the sale, even if for only \$5 an acre, because otherwise she would lose everything by foreclosures. It was not until September, 1927, that she discovered this advice to have been motivated by personal gain and so was brought to question Taylor's good faith. At this point inquiry became a duty and plaintiff was chargeable with what she would discover if inquiry were made. *Henigan v. Yolo Fliers Club*, 208 Cal. 697, 284 P. 906; *Victor Oil Co. v. Drum*, supra. The fraud was in essence a concealed fraud; that is, it consisted in Finnie's procuring Taylor to represent to the plaintiff that it was his opinion as a banker and man of business that it was highly advisable for plaintiff, in the situation in which she found herself, burdened with overdue debts and with her properties encumbered as security therefor, to accept the offer made by Finnie; that the bank of which he was the managing agent, would, unless she accepted it, foreclose upon one of her properties and that the holders of the trust deed upon the other, with whom the bank had negotiated the loan, would foreclose upon it. Taylor's knowledge to the contrary was concealed despite the confidential relationship found by the trial court to exist between the

bank and Mrs. Rutherford. The finding of a confidential relationship is amply sustained by the evidence (*Bank of America v. Sanchez*, 3 Cal.App.2d 238, 38 P.2d 787), and, in view of its existence, Mrs. Rutherford cannot be charged with lack of diligence in making independent investigation either at the time or afterward. *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 575-577, 126 P. 351, 42 L.R.A., N.S., 125; *Marston v. Simpson*, 54 Cal. 189, 190.

[8] The appellant insists that the complaint was insufficient to sustain a finding upon the issue of the statute of limitations in that it did not "show the acts of fraud were committed under such circumstances that she would not be presumed to have any knowledge of them—as that they were done in secret or kept concealed" nor were the circumstances of the discovery fully stated, relying chiefly upon *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 16 P.2d 268. In that case the ruling was on demurrer and no leave to amend had been asked, hence it was not determined whether the defects could have been cured. Here the representations constituting the fraud were plainly alleged, disclosing that the fact of the bad faith of Taylor's advice and information regarding the intention of the bank with respect to the mortgage must necessarily have been concealed from the plaintiff, and the plaintiff alleged her discovery of the fraud followed upon her receipt of the documents evidencing Finnie's payment to Taylor. In the absence of a showing that the appellant was misled by failure to plead with greater particularity the circumstances surrounding the discovery of the fraud, the complaint must be held to be sufficient in the absence of a special demurrer addressed to that defect. *Victor Oil Co. v. Drum*; *Consolidated R. & P. Co. v. Scarborough*, both supra.

[9] The appellant's final contention is that the court failed to find upon the issue of whether the statute of limitations was a bar to the action. The court found to be true the allegation "that prior to the date last mentioned (September 15, 1927) the plaintiff had no knowledge of the herein alleged fraud and deceit, nor of any cause or notice to suspicion that fraud or deceit of any kind or character had been practiced upon her". This finding that plaintiff had no actual knowledge of the fraud nor of any fact which would lead her to

suspect that a fraud had been practiced upon her, coupled with the finding of a confidential relationship, can lead to only one conclusion, that the action was not barred. It is therefore sufficient. *Ready v. McDonald*, 128 Cal. 663, 61 P. 272, 79 Am. St.Rep. 76; *Spadoni v. Maggenti*, 121 Cal. App. 147, 156, 8 P.2d 874.

Judgment affirmed.



11 Cal.2d 470

**WHITTIER MUT. ORANGE & LEMON
ASS'N et al. v. AGRICULTURAL PRO-
RATE COMMISSION OF CALIFORNIA
et al.**

L. A. 16272.

Supreme Court of California.

June 30, 1938.

1. Agriculture ⇐2

Under statute providing that petition for institution of system of prorated marketing should be signed by owners of two-thirds or more of producing factors in zone, any unit selected as the producing factor by the petitioners which reasonably measures production must be considered sufficient, since purpose of provision was to insure approval of those controlling two-thirds of production. St.1933, pp. 1970, 1974, §§ 2(h), 11.

2. Agriculture ⇐2

A standard packed box of lemons of previous season was a proper unit of production, or "producing factor," to be used in instituting a system of prorated marketing of lemons, where petition therefor, requiring signatures of owners of two-thirds of producing factors, was filed in early spring before any substantial part of new crop had been harvested. St.1933, pp. 1970, 1974, §§ 2(h), 11.

3. Agriculture ⇐2

Where standard packed box of lemons of previous year had been selected by petitioners as the unit to measure production of lemons in connection with institution of system of prorated marketing of lemons, petition signed by owners of more than two-thirds of packed boxes produced during previous year complied with statutory require-

ment that petition should bear signatures of owners of two-thirds of producing factors, notwithstanding that owners of two-thirds of boxes remaining unsold may not have signed petition. St.1933, p. 1974, § 11.

4. Agriculture ⇐2

Under Agricultural Prorate Act providing that secondary proration certificates should be used to control time and volume of harvesting or other preparation for disposal, lemon marketing allotment plan providing for prorating the marketing of lemons while lemons were in storage complied with act, where it appeared that plan could be more conveniently administered at that time. St.1933, p. 1977, § 20.

5. Agriculture ⇐2

The amendment to Agricultural Prorate Act authorizing proration based upon actual production, whether in storage or otherwise, authorized proration plan, instituted subsequent to its enactment, based upon amount of lemons in storage. St.1935, p. 1537, §§ 18, 19.1.

6. Agriculture ⇐1

Where a standard packed box of lemons of previous season had been selected as the "producing factor" by those forming prorate marketing district for marketing of lemons, and district was validly formed under existing laws requiring approval of owners of two-thirds of producing factors, subsequent amendatory statute defining term "producing factor" as a unit of one acre did not operate retroactively so as to invalidate district previously formed. St.1933, p. 1974, § 11; St.1935, p. 1527, § 2(k).

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by the Whittier Mutual Orange & Lemon Association and others against the Agricultural Prorate Commission of the State of California and others to enjoin the enforcement of the Agricultural Prorate Act. Judgment for plaintiffs, and defendants appeal.

Judgment reversed.

U. S. Webb, Atty. Gen., Walter L. Bowers and Alberta Belford, Deputy Attys. Gen., and Edson Abel, of San Francisco, for appellants.

Jennings & Belcher, of Los Angeles, and Bruce McDaniel, of Redlands, for respondents.

LANGDON, Justice.

This is an appeal from a judgment of the trial court holding invalid the formation of a lemon prorate district under the terms of the Agricultural Prorate Act, Stats.1933, p. 1969, as amended; Deering's General Laws, 1937, Act 143a, p. 60. The nature of the act was fully considered, and its constitutionality upheld, in our prior opinion, *Agricultural Prorate Commission v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495.

On March 28, 1935, a petition, signed by a number of persons seeking the institution of a system of prorated marketing of lemons grown in the state, was filed with the Agricultural Prorate Commission. After a hearing, the petition was granted, and a zone or district covering the entire state was formed, a prorate program was established, and defendant Shippey was appointed zone agent to administer the program. On May 8, 1935, this action was instituted by various lemon growers and shippers against the commission, its members and the prorate committee, to enjoin the enforcement of the act. A temporary injunction was granted by the trial court, whereupon an alternative writ of prohibition was issued by this court. Upon consideration by this court the act was held constitutional, but the cause was sent back to the trial court for the determination of the question whether the petition for formation had been signed by the requisite number (two-thirds) of the lemon producers. *Agricultural Prorate Commission v. Superior Court*, supra. In the subsequent trial, the record of which is quite voluminous, this issue of fact was tried, and the court gave judgment permanently enjoining defendants from enforcing the prorate program on the ground that the statutory requirements had not been followed. Defendants appealed. Since the constitutionality of the act has been fully settled by our prior opinion, we shall consider only the attack on the procedure taken under it.

This attack centers around section 11, which provided that the petition shall be sufficient if signed by "two-thirds or more of the producers of the commodity named in the petition within the zone described and by the owners of two-thirds or more of the producing factors in said zone". (Subsequent amendments have changed this provision, but the above language applied at the time the present district was formed.) A double requirement is made by this section: there must be the requisite number

of individual lemon growers, i. e., the producers, and also the requisite number of owners of the units or factors of production. In other words, a large number of individuals who produced only a small amount of lemons could not force the institution of a prorate program; nor could a few large producers, controlling the major part of the production, do so against the wishes of the greater number of smaller producers. The act requires a concurrence of two-thirds of the producers, and of those persons who control two-thirds of the production. Plaintiffs contend, and the trial court found, that the petition was defective in both requirements.

[1,2] The first and major ground of invalidity found by the lower court is that the petition was not signed by the requisite number of owners of producing factors, the theory of the decision being that the petitioners failed to choose a proper factor. In this connection it may be observed that the term "producing factor" is not of fixed and certain meaning, and that various kinds of units of production, such as acreage, bearing trees, etc., could reasonably be considered to fall within its scope. It was intended, as already pointed out, to furnish a measure of production. The act, section 2, subdivision (h), provided at this time: "The term 'producing factor' means the unit of production specified in the petition." Any unit selected by the petitioners, which reasonably measures production, must be considered sufficient. In the instant case the unit chosen was "a standard packed box of lemons" of the previous season. The petition was filed in the early spring, before any substantial part of the new crop had been harvested, and the actual production of the previous season was taken as more satisfactory than a mere estimate of the new year's production. That the owners of more than two-thirds of the standard packed boxes of lemons produced in the previous year really represent approximately that quantity of the present year's production can hardly be successfully disputed, and the record does not contain any evidence tending to show that the unit was not, in fact, a fair one.

The sufficiency of the packed box of lemons as a producing factor was, indeed, declared in our prior decision. We said there (5 Cal.2d page 585, 55 P.2d page 513): "From the definition given in the act of the term, 'producing factor' as 'a unit of production,' we think it well may mean some

definite part of that which is produced, and that in specifying such unit of production, as a packed box of lemons, the petition was within and complied with the terms of the act." We also held in that opinion that the specification of the previous year's crop was a proper method of determining the production, since it offered definite and not uncertain data: "* * * the plan adopted was fair and just to all growers. It worked for certainty and definiteness, and in most respects was preferable to a procedure depending upon the uncertain method of a mere estimate of what might be produced during the current year. This resort to the previous year's crop was only had for the purpose of fixing some basis upon which to institute proceedings for the formation of the district. The previous year's crop did not enter into the future acts of the committee in prorating crops thereafter to be produced and made the subject of proration. The proration of any future crop would be governed entirely by the amount of such crop and the individual production of each grower."

[3] Notwithstanding our expressions on this point, the trial court was of the opinion that the petition failed to comply with the law. In the prior hearing before this court, it was argued that a packed box of lemons is not a "producing factor", such as a tree or acre of land, but is a "produced factor", and cannot fulfill the statutory requirement. This insistence upon a strict and literal meaning, ignoring the broad statutory definition of the producing factor as a "unit of production", in an effort to defeat the purpose of the act, was rejected by our first decision. We again affirm the holding that a packed box of lemons is a unit which may measure the production of lemons, and though counsel have again argued the point, the lower court conceded that it was a closed issue. But the court observed that our holding was ineffective because the statute required signatures of the owners of two-thirds of the producing factors in the prorate district. Obviously the bulk of the past season's production had been sold and shipped out of the state at the time the petition was filed. A few boxes remained unsold within the state, in storage with packing associations, but the court held that the evidence was insufficient to show the ownership of these boxes. Hence, the court concluded, there was no proof that the owners of the producing

factors within the state at the time of the petition were the signers thereof.

At the outset it may be said that this objection is highly technical, and has no relation to the objects of the act. So far as the statutory purposes are concerned, the petition is in full conformity, for it is not denied that the producers of the major portion of the crop are seeking the adoption of a proration plan. Moreover, to adopt the theory of the plaintiffs would mean that the signers could be the owners of the small residue of lemons remaining unsold at the time of the petition, which would defeat rather than carry out the statutory aim. Inasmuch as the whole object of the choice of a particular producing factor is to see that it represents the production of the commodity, the statute can only be satisfied when a unit is chosen which does so. And there is no express statement therein that those producers, determined by the last season's production under the present plan, shall have actual possession or ownership of the individual units of production at the exact time of signing. The signers were then and are now the bulk of the lemon producers of the state. They were owners of more than two-thirds of the packed boxes for the previous year, and without doubt would produce and own more than two-thirds in the subsequent year. Under these circumstances we think the statutory requirement was substantially fulfilled in this respect.

It is therefore unnecessary for us to consider at length the strong evidence produced by defendants to show that more than two-thirds of the small residue of unsold boxes left in the state at the time the petition was signed were actually owned by the signers.

[4] The second ground of attack is that the prorate program is based upon the amount of fruit in storage, instead of on production, and that this violates the statutory requirements. The court below recognized that the storage count was perhaps the most effective means, and that it might be impracticable to prorate on the basis of harvesting, but it held, nevertheless, upon an analysis of the statutory provisions, that it compelled the latter and did not permit the former. The argument is that under the statute the grower may not harvest a commodity unless he has first secured a "secondary proration certificate", and that under the lemon proration plan he would not receive a secondary certificate until his fruit was harvested and placed in storage.

Here, again, it seems to us that a strained construction has been employed, without adequate consideration of the obvious purposes of the statutory language. Section 18 gives the committee power to determine the method and manner of prorating, and section 20 provides that secondary certificates "shall be used to control the time and volume of harvesting or other preparation for disposal". Section 20 then states: "It shall be unlawful for any commodity to be harvested, prepared for market and/or marketed unless and until there shall have been an appropriate secondary proration certificate issued therefor. * * *" Bearing in mind the objective, namely, an effective and practical method of proration, we cannot ascribe to the legislature the absurd aim of preventing harvesting until a certificate is issued, but withholding a certificate until storage after harvesting. It is quite clear that a flexible authority was intended, to permit the granting of the certificates at any stage in the production of the particular commodity which would permit the most effective regulation. If, in the case of some commodities, the time of harvesting appears to offer the best opportunity to enforce the regulation, the proration plan could provide for secondary certificates to be issued at that time to control the "harvesting" (section 20). If, on the other hand, the time for effective control was the time the crop was stored, the secondary certificates could be issued then, not to control the harvesting but to control the "other preparation for disposal". (Section 20.) Where the plan requires the certificate prior to harvesting, it would be unlawful to harvest without it; but where the plan, as here, requires the certificate after storage and prior to marketing, it is lawful to harvest and store, but not to market without the certificate. In the present case the evidence shows that storage is the ordinary step which follows harvesting in the case of practically all the lemons produced. They are delivered to the place of storage for curing, washing, grading, etc., as well as to await the most favorable market, and though the act makes special provision for proration of the small portion of the crop which does not go into storage, the bulk of the crop is handled in this manner. To apply the proration plan, i. e., to make the marketing allotments, when practically the entire product is in conveniently located warehouses, with each grower's production measured and identified, is entirely rea-

sonable and fully complies with the statutory provisions.

[5] Moreover, the issue is completely set at rest by the 1935 amendment, St.1935, p. 1537, to section 18 and the enactment of a new section, 19.1, which provides: "Proration may be periodic or seasonal in character and may be based upon actual production, whether in storage or otherwise, or upon estimated production." This amendment, enacted after the formation of the district, but prior to the institution of the proration plan attacked herein, is clearly applicable to the present proceeding. See *Dr. Miles Calif. Co. v. Sontag Chain Stores*, 8 Cal.2d 178, 64 P.2d 726. Indeed, plaintiffs concede the applicability of the legislation of 1935 to the present proceeding, and contend that other changes in that year, now to be discussed, are also applicable.

[6] We have already pointed out that under our prior decision and by the application of reasonable rules of construction, the standard packed box of lemons was a proper "producing factor". In 1935, St.1935, p. 1527, section 2, subdivision (k), was amended to read: "The term 'producing factor' means the unit of one acre unless the commission finds a smaller unit is required * * *." Plaintiffs contend that this amendment nullifies the entire proceeding taken by the petitioners because the standard packed box of lemons is no longer a proper producing factor. But plaintiffs have ignored a substantial difference between the two 1935 amendments mentioned, and their contention that if one applies, both must, is unfounded. The amendment authorizing proration based upon storage (see *supra*) has this effect: a proration zone or district was properly formed by compliance with the statutory requirements then in force; the committee then proceeded to institute a plan of proration for that zone; the plan would be valid if, at the time it was placed in operation, the law authorized it. Here, at the time the proration plan was to go into effect, based upon storage, its validity could rest upon the law as amended in 1935, then in force.

But the other 1935 amendment, changing the definition of "producing factor", relates to the requirements essential to the formation of the district or zone itself. The original petition for formation must be signed by owners of two-thirds of the "producing factors". In the present case it was so signed, as we have held; and the

district was validly formed and prepared to function. As to its future operations, e. g., the institution of a proration program, and the allocation of marketing quotas, it would be governed by the law in force at the time it acted. But as to its past formation, no statutory change can be construed to operate retroactively so as to make this invalid. Where new districts are to be formed to control production in other commodities, the producing factors chosen must come within the new legislation. But the present district, validly organized under existing law, was not affected by the changed requirements for the organization of new districts.

Plaintiffs also assert that the program approved would result in injustices to them. However, the trial court considered that the commission's contrary findings on this point were not open to question, in so far as the validity of the program was concerned, and this holding was manifestly correct.

No other points require discussion. The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.



**ENTREMONT et al. v. WHITSELL et al.,
Railroad Commission. ***

S. F. 15772.

Supreme Court of California.

June 30, 1938.

Rehearing Granted July 28, 1938.

1. Bailment ☞4

Under agreement for "rental" of dump trucks to Department of Public Works for 500 hours each at \$2.50 each per hour, "including operation," the phrase "including operation" was intended to specify that owner should furnish drivers for rented trucks.

2. Automobiles ☞59

Under agreement for "rental" of dump trucks including drivers to Department of Public Works providing that drivers would perform duties to satisfaction of department which had authority to replace drivers for failure to so perform and that drivers were to work with regular highway crew in ac-

cordance with practice of department, drivers were "special employees" of Department of Public Works and their possession of trucks was that of the department, since department had exclusive control of drivers, as respects authority of Railroad Commission to regulate rates charged by owner under agreement. St.1935, p. 878.

[Ed. Note.—For other definitions of "Special Employee," see Words & Phrases.]

3. Automobiles ☞76

An agreement for rental of dump trucks including drivers to Department of Public Works providing that drivers were to perform duties to satisfaction of department which had authority to replace drivers for failure to so perform and that drivers were to work with regular highway crews in accordance with practice of department constituted a "rental" of equipment and not a "contract for transportation of property," and hence department and not owner was a "highway carrier" and Railroad Commission had no authority under Highway Carriers Act to regulate rates of rental charged by the owner. St.1935, p. 878.

[Ed. Note.—For other definitions of "Rental," see Words & Phrases.]

4. Automobiles ☞59

The fact that the owner of dump trucks had a permit as a radial common carrier did not make owner subject to Highway Carriers' Act unless he performed some act or service embraced in terms thereof. St.1935, p. 878.

5. Automobiles ☞76

A person, although in the business of transporting property by trucks on the highway, is not a "highway carrier" as respects trucks which have been hired to and are being operated by another, the action of the owner and not the use being made of his trucks determining whether the owner is a "highway carrier" within statute. St.1935, p. 878.

In Bank.

Original proceeding by Paul Entremont and the People of the State of California on the relation of the Department of Public Works against Leon O. Whitsell and others as members of and constituting the Railroad Commission of the State of California to annul an order of the Railroad Commission.

Order annulled.

Prior opinion, 68 P.2d 964.

*For subsequent opinion see 89 P.2d 392.

Albert E. Sheets, of Sacramento, for petitioner Paul Entremont.

C. C. Carleton, C. R. Montgomery, Robert E. Reed, and Frank B. Durkee, all of Sacramento, for petitioner department of Public Works.

P. N. McCloskey, Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ.

Carl R. Schulz, of San Francisco, amicus curiæ, for California Hay, Grain and Feed Dealers' Ass'n.

Ira H. Rowell, Frank B. Austin, Scott Elder, and Mary J. Moran, all of San Francisco, for respondent Railroad Commission.

Sanborn, Roehl & MacLeod and Edward M. Berol, all of San Francisco, Wallace K. Downey and H. J. Bischoff, both of Los Angeles, and Douglas Brookman, Hugh Gordon, and Reginald L. Vaughan, all of San Francisco, Robert Brennan, of Los Angeles, Gerald E. Duffy, of San Francisco, Frank Karr and E. E. Bennett, both of Los Angeles, C. W. Dooling, L. N. Bradshaw, McCutchen, Olney, Mannon & Greene, Guy V. Shoup, and C. O. Amnette, all of San Francisco, and R. E. Wedekind, of Los Angeles (Varnum Paul, of San Francisco, of counsel), amici curiæ.

CURTIS, Justice.

This is an original proceeding instituted in this court for the purpose of annulling the order of the respondent Railroad Commission directing petitioner herein, Paul Entremont, to "forthwith proceed within forty days from the date hereof, to collect the amount of the undercharge, to-wit: \$25.72 found to exist in the preceding opinion, and to report to the Commission under oath when this has been accomplished," and to "hereafter abstain from charging and collecting for the transportation as a highway carrier * * * rates less than the minimum lawful rates for such transportation by said respondent (Paul Entremont) established by order of this Commission".

[1] Paul Entremont is the owner of certain dump trucks operated by automotive power. On February 11, 1936, he as such owner entered into a written agreement with the Department of Public Works, Division of Highways (hereinafter referred to as the Department of Public Works, or the department) "for the rental of three * * * three and one half yard dump

trucks for 500 hours each at \$2.50 each per hour, including operation." The phrase "including operation" was meant to be understood as specifying that Entremont should furnish drivers for the rented trucks, and another provision of the agreement expressly provided that he should do so. The agreement further provided that "the trucks are to be used principally under power shovels for hauling gravel, slide material, etc., and miscellaneous hauling jobs as required anywhere in District I". The agreement also provided that "the operators (drivers of the trucks) furnished under this Service Agreement are to perform their duties to the satisfaction of the Department of Public Works and the vendor is to replace them at any time that they do not prove satisfactory, at his own expense. The operators are to work with the highway crews, similar to the practice now being followed by the Department of Public Works' operators." It is admitted that the trucks were used by the Department of Public Works exclusively in the repair of the state highway within said district.

Prior to entering into said agreement, the Railroad Commission, purporting to act under the authority given it by the Highway Carriers' Act, had established as the minimum rate for the transportation of commodities for which dump trucks with drivers were rented at the sum of \$2.59 per hour. It will thus be seen that the contract price of \$2.50 per hour, as fixed by the agreement between Entremont and the Department of Public Works, was nine cents below or less than the minimum rate fixed by the Railroad Commission for such service. Between specified dates the trucks were in use by said department, pursuant to said agreement, 251 hours, and at the rate fixed by the agreement, less a discount of one-half per cent, the total paid by the department for the use of said trucks during said period of time was \$25.72 less than the minimum rate fixed by the commission for such service.

Upon its own motion, the Railroad Commission instituted an investigation into the charges which Entremont was making for the use of his dump trucks under said agreement with the Department of Public Works. In this proceeding the department intervened on behalf of Entremont. Two truck associations also asked and were granted leave to intervene in said proceedings. Their interest was common to that of En-

tremont and needs no separate consideration. The result of this investigation was the order of the Railroad Commission to annul which this proceeding was instituted by Entremont and the People of the State of California against the Railroad Commission and its members.

[2,3] In support of the order under review, the respondents contend that the agreement between Entremont and the department is a contract for transportation of property and not a rental of Entremont's trucks. This contention is based in the main upon that provision of the agreement by which Entremont agreed to furnish drivers or operators for the trucks. They concede that if only the trucks were furnished to the department by Entremont the transaction would be a rental contract and not a contract for the transportation of property. They argue, however, that as Entremont's employees were driving the trucks while in use by the department, the trucks were in the possession of Entremont, and the sand and gravel or other road materials which were hauled in the trucks were transported by Entremont and not by the department. The evidence is without conflict that after the trucks were delivered to the department they were under the exclusive control of the officers and employees of the department. The agreement expressly provides that the drivers of the trucks (operators) are to perform their duties to the satisfaction of the department, and in case of their failure they are to be replaced by others who will meet the requirements of the department. The drivers were to work with the regular highway crews and to perform duties similar to those performed by the regular crew and in accordance with the practice of the department. They thus became the special employees of the department (Department of Water and Power v. Industrial Acc. Comm., 220 Cal. 638, 32 P.2d 354; Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757), and, as the department had the exclusive control of the operators during the time they were thus employed, their possession of the trucks was that of the department. The department by means of the trucks operated by their agents was therefore transporting the road materials over the highway, and not Entremont, who had rented his property to the department. The department in the operation of Entremont's trucks was in no different position than when it was using

trucks operated by its own highway crews. In either case, the act of transporting property over the highway was the act of the department. We conclude, therefore, that the agreement with Entremont was a rental of his equipment, and was not a contract for the transportation of property. In such a case the "hirer (or lessee) would be a highway carrier, but not the letter (or lessor)." *People v. Tedesco*, 18 Cal.App.2d 667, 64 P.2d 966, 967. As Entremont under said agreement was a mere letter or lessor of the trucks and not a transporter of property over the highway, the commission would have no authority over the rates of rental charged by him for the use of his property.

While there are certain features of the agreement which are not to be found in an ordinary contract of rental, yet when the agreement is taken as a whole, and particularly where the word "rental" is used on more than one occasion to denote the character of the service to be rendered by Entremont and the compensation to be paid him by the department, we think that the only reasonable construction to be given the agreement is that which we have already indicated. We might add that there is a total absence of any reference in the agreement to any undertaking on Entremont's part to transport property on the highway or elsewhere.

[4,5] It is true that Entremont held a permit as a radial common carrier, but the mere possession of such a permit would not make him subject to the Highway Carriers' Act (Stats.1935, chap. 223, p. 878) unless he was performing some act or service embraced within the terms thereof. The mere leasing or letting of his trucks to the Department of Public Works or to any other body or person for transporting property on the highway was not such an act. "It would also be true that one, although in the business of transporting property by trucks on the highway, would not be a highway carrier, so far as the operation of particular trucks was concerned, if they were hired to and were being operated by another. It is what the owner does, not what his trucks are doing, that determines whether or not he is a highway carrier." *People v. Tedesco*, 18 Cal.App.2d 667, 669, 64 P.2d 966, 967.

This case has been extensively briefed by the parties and also by numerous amici curiae appearing for parties interested in its decision upon the question of the consti-

tutionality of the Highway 'Carriers' Act. (Stats.1935 chap. 223, p. 878.) As we are of the view that the agreement between Entremont and the Department of Public Works was a lease and not a contract for transportation of property over the public highway and therefore the rates fixed by the commission for such transportation service do not in any manner control said rental charge, it becomes unnecessary, if not improper, for us to pass upon the constitutionality of said act. For that reason we express no opinion as to the constitutional question discussed in the briefs filed herein.

The order is annulled.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.



11 Cal.2d 464

Ex parte WALKER.

Cr. 4153.

Supreme Court of California.

June 30, 1938.

Rehearing Denied July 28, 1938.

1. Gaming

One who for a commission fee placed bet on horse race by telephoning to a representative, who actually made the bet on pari-mutuel machine within inclosure of race track, violated statute against bookmaking, notwithstanding exception in favor of wagers made inside an inclosure for "a principal who is not within the inclosure." Pen. Code § 337a, subd. 3; St.1933, pp. 2047, 2053, §§ 3, 15; St.1935, p. 1943, § 3.

2. Gaming

The statute providing for licensed horse racing and regulated wagering contemplates legalizing specific type of wagering by spectators, without intention of authorizing bookmaking or betting at poolrooms or other gambling establishments away from the track. St.1933, p. 2046, as amended.

3. Gaming

Under statute providing that "wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure" shall be legal, and

that "any activity of the principal in connection with such wager" should not be considered illegal, agent may place bet in inclosure without violating statute, but may not delegate his duty and authorize subagent to place bet within the inclosure. St.1935, p. 1943, § 3.

4. Gaming

A commercial solicitor of bets operating outside licensed race track, receiving bets from others, and having them placed by representatives, is not protected by statute permitting placing of bets for a "principal," irrespective of whether bets are solicited on the street or in a shop. St.1935, p. 1943, § 3.

In Bank.

Habeas corpus proceeding by William Walker for relief from arrest for violation of gambling statutes.

Writ discharged and petitioner remanded.

John W. Preston, of San Francisco, Irwin H. Roth, of Los Angeles, Edgar B. Hervey, of San Diego, and John T. Holt, of Los Angeles (Irwin H. Roth, of Los Angeles, and Preston & Preston, of San Francisco, of counsel), for petitioner.

Pierce & Sherwin, of Oakland, and Morris Lavine, of Los Angeles, amici curiæ.

Buron Fitts, Dist. Atty., and Alexander H. Van Cott and Jere J. Sullivan, Deputies Dist. Atty., all of Los Angeles, for respondent.

PER CURIAM.

This is a petition for a writ of habeas corpus.

Petitioner was charged with a violation of section 337a, subdivision 3 of the California Penal Code, making it a crime to receive, hold, or forward a sum of money or other thing of value, to be placed as a bet. The stipulated facts show that on December 29, 1937, in the city of Los Angeles, the complaining witness solicited petitioner to place a \$2 bet on a certain horse in a race to be run at the licensed race track at Santa Anita, California. Petitioner agreed to do this, and charged a fee of 10 per cent, or 20 cents, for this service. Thereafter petitioner telephoned his representative in the vicinity of the race track, instructed him to place the bet, and the representative went within the enclosure and purchased a ticket which entered the bet through the pari-mutuel machine. When the race was run, pe-

petitioner informed the complaining witness of the result, and was thereupon arrested. At the preliminary hearing, he was held for trial, and sought this writ.

[1] Petitioner is obviously guilty of a violation of the terms of said section 337a (3) of the Penal Code. The question before us is whether that section is operative under the facts set forth above, or whether it is inapplicable by reason of the provisions of the "Horse Racing Act" of 1933, St.1933, p. 2046, as amended in 1935, St. 1935, p. 1586, 1943, Deering's Gen.Laws, Act 3421.

[2] The said statute provides for licensed horse racing, and establishes a regulated form of wagering on races under what is known as the "pari-mutuel" system, the bets being placed through the pari-mutuel machine or "totalisator" located inside the race track enclosure. A legal wager could be made under the act only through the machine, within the enclosure, and only on the dates for which horse racing is licensed. Where the conditions laid down by the act are followed, wagering on horse races is legal, and therefore the statute creates an exception to the general prohibitions contained in the Penal Code. But the act does not purport to repeal section 337a of the said code. In section 3 of the act, St.1933, p. 2047, it is stated: "All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal." Section 15, St.1933, p. 2053, similarly declares that all other forms of wagering shall be punishable as provided in the Penal Code. See *People v. Torrey*, 16 Cal.App.2d 470, 60 P.2d 900; *In re McKelvey*, 19 Cal. App.2d 94, 64 P.2d 1002. It seems clear, in general, that the act contemplated the legalizing of a specified type of regulated wagering by spectators at the races, and as incidental to the supposed social and sporting interest in the actual races. It is equally clear that there was no intention to authorize bookmaking or betting at poolrooms or other establishments, as a purely gambling venture, away from the track. The argument to the voters, submitted at the time the measure was presented for popular vote, stated: "Wagering will be confined to licensed race track enclosures—thus aiding in the elimination of pool rooms and such other undesirable places."

[3] In 1935, St.1935, p. 1943, however, an amendment was enacted, adding the following to section 3. "A wager made *inside* an enclosure under the pari-mutuel system *for a principal who is not within* the enclosure shall be considered a wager made within the enclosure for the purpose of this act and *any activity of the principal* in connection with such wager shall not be considered a wager made *outside* the enclosure." It is upon this amendment that petitioner relies. The meaning of the amendment is not at all clear. Its purpose seems to be to permit betters to place wagers without actually coming to the track to see the horse race. The better, called a "principal" in the amendment, may apparently telephone or telegraph his bet, or otherwise forward directions with some one who attends the race, or to someone who is inside the enclosure, who then makes the wager through the machine in a lawful manner. The amendment provides that the "principal", that is, the man who makes the wager, may do this, and *any activity by him* is not to be considered an illegal wager.

But what of the person to whom the directions are given, the agent of the better? The amendment is silent as to him. It legalizes the activity of the "principal" only. However, if the agent is actually located within the enclosure and places the bet there, he would seem to be acting legally within the provisions of the entire statute, for if an absent principal may make a bet, and a bet is legal when placed within the enclosure, the activity of the agent in placing it there cannot be criminal. This much we may concede from the language of the original statute taken together with that of the amendment.

[4] But the conduct of petitioner goes one step further. Instead of an agent of the *principal* at the track, we have an agent of the *agent* there. The same thing is accomplished, namely, the placing of a bet for an absent principal. But a new element has entered: the agent is not at the track but is located in any place, no matter how distant, and he himself has a subagent at the track to place the bets. Petitioner argues that what the principal may do himself, he may do through an agent, and that an agent may under ordinary circumstances delegate his duties to a subagent. This may be perfectly true as a matter of the general law of agency, but it does not solve the problem presented here with respect to the scope of this statutory excep-

tion to our general gambling laws. Under petitioner's view, commercialized gambling conducted away from the track would be permitted to flourish. Individuals could establish betting centers anywhere, solicit and place bets in any amount, so long as they communicated the amounts to the track and had the bets placed there through the machine. If this was the purpose of the amendment, it radically changed the original statute and eliminated most of the protective regulations designed to prohibit widespread commercial gambling on horse races. Before such an interpretation can be upheld, the statute must clearly compel it. The statute before us does not. The only thing clear about the amendment is that the principal or better does not commit any crime. But the actions of the commercial solicitor of bets, operating outside the track, receiving bets from others and never placing them himself in the manner authorized by the law, do not come within the protection of the 1935 amendment. This being so, those acts are punishable under the provisions of the Penal Code.

These views are in accord with those reached by the District Court of Appeal in *Ex parte Goddard*, 74 P.2d 818, wherein it appeared that the petitioner conducted a business at a particular place for the purpose of accepting wagers on commission, and having them placed by his employee within the enclosure. In that case the court said (page 825): "Section 3 of the Horse Racing Act, as amended, affords no defense for one who maintains and operates, as petitioner herein maintained and operated, an establishment outside the track enclosure for the purpose of aiding, soliciting, encouraging, and promoting commercialized gambling upon the results of races at which neither he nor his so-called 'principal' are spectators. The claim, therefore, that such conduct and acts are within the purview of the Horse Racing Act is a mere subterfuge and an attempt to circumvent the established policy of the state against commercial gambling, and is without legal sanction either in the Horse Racing Act as originally adopted or as subsequently amended." Although the stipulation in the instant case does not disclose that petitioner maintained a place of business for his operations, and only one act of soliciting is charged herein, we see no material difference, in so far as the present statute is concerned, between soliciting bets on the street or in a shop, for in each case the acts

of the agents take place outside the enclosure.

The writ heretofore issued is discharged and the petitioner remanded to custody of the sheriff of Los Angeles county.



11 Cal.2d 441

CULVER CITY v. REESE et al.

L. A. 16780.

Supreme Court of California.

June 28, 1938.

1. Municipal corporations ☞907

The provisions of statute relating to re funding of bonded indebtedness of special improvement districts, including those lying within two or more cities, imposing upon county officials duty to collect assessments for the respective cities were not invalid, where provisions merely continued assessment and collection of taxes by county officials who had previously performed such services. *St.1935, p. 2045, § 24; St.1937, p. 1684, § 25.*

2. Taxation ☞43

The provisions of special improvement bond refunding statute providing for imposition of a special tax levy upon city in absence of available funds with which to make payments as purchaser of delinquent property, as applied to improvement district lying within more than one city, were not invalid on ground of lack of uniformity in that double taxation would result, where each city's liability would be uniform in proportion that amount of delinquency bore to assessed value of all property in city. *St.1937, p. 1684, § 25; Const. art. 1, § 11.*

3. Municipal corporations ☞871

The provision of special improvement bond refunding statute, that city should be deemed purchaser of delinquent property lying within its boundaries, and requiring city, in absence of available funds to make payment therefor, to levy special tax for purpose of paying for lands purchased, was not invalid on ground that advancement of city funds constituted a gift of public moneys or a pledge of city's credit. *St.1937, p. 1684, § 25.*

4. Municipal corporations $\S$ 957(2)

The provision of special improvement bond refunding statute requiring city, in absence of available funds with which to make payment for delinquent lands, to levy special tax for purpose of paying for such lands did not violate constitutional provisions prohibiting Legislature from imposing taxes upon city for city purposes, and from delegating to any special commission or private corporation, association, or individual, power to levy taxes or assessments. St.1937, p. 1684, $\S$ 25; Const. art. 11, $\S\S$ 12, 13.

5. Municipal corporations $\S$ 957(2)

The provisions of special improvement bond refunding statute relating to collection of assessments by county officials and requiring city, in absence of available funds with which to make payment for delinquent lands, to levy special tax for such payments, were enacted pursuant to legislative power to authorize by general laws appropriate officers to assess and collect taxes for specified purposes, and were not therefore invalid as an unauthorized delegation of power to levy municipal taxes. St.1935, p. 2045, $\S$ 24; St.1937, p. 1684, $\S$ 25; Const. art. 11, $\S$ 13.

In Bank.

Mandamus proceeding by the City of Culver City against Vincent M. Reese, as engineer of work for the refunding of the indebtedness of Acquisition and Improvement District No. 3 of the City of Culver City, and another, to compel the respondents to prepare a diagram of the property included within the Acquisition and Improvement District, and to make an assessment as provided by the Refunding Assessment Bond Act of 1935.

Peremptory writ issued.

M. Tellefsen, City Atty., of Culver City, and O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, for petitioners.

Clyde Woodworth, of South Gate, for respondents.

SHENK, Justice.

The petitioner, the City of Culver City, presents its application for the writ of mandamus to compel the respondents, Engineer of Work and Superintendent of Streets, respectively, to prepare a diagram of the property included within Acquisition and Improvement District No. 3 of the City of Culver City, and to make an as-

essment, both as provided by the Refunding Assessment Bond Act of 1935.

Acquisition and Improvement District No. 3 of the City of Culver City was formed under the provisions of the Acquisition and Improvement Bond Act of 1925 as amended. Stats.1925, p. 849; Stats.1927, pp. 1358, 1804, 1886. The district lies partly within the City of Culver City and partly within the City of Los Angeles. Bonds of the district were issued in the principal sum of \$50,580.60, bearing interest at seven per cent. They were issued to mature \$2,800 annually in the years 1931 to 1948, inclusive. In February, 1938, unpaid principal on outstanding bonds amounted to \$41,980.60, of which \$11,000 was past due. The interest due and unpaid was \$11,569.12. The percentage of tax delinquencies had steadily increased annually to over eighty per cent. The petitioner, which had conducted the original proceedings, instituted a proceeding to refund the indebtedness of the district under the Refunding Assessment Bond Act of 1935. (Stats.1935, p. 2023; Stats.1937, p. 1675; Stats.1938, Ex. Session, p. 73, ch. 13.) The total of the refunding bonds noticed to be issued is the sum of \$35,000 to mature in ten annual instalments with interest reduced to six per cent.

The consent of all necessary parties was obtained and the proceedings duly progressed to the point where the respondents had refused to comply with the respective demands to perform the duties imposed upon them by the provisions of the act. As a return to the alternative writ the respondents have filed a general demurrer to the petition.

The ground of the refusal of the respondents to comply with the request to prepare a diagram and to make the assessment is that certain provisions of the Refunding Assessment Bond Act, as they apply to assessment districts lying within two municipalities, are unconstitutional. A general inquiry into the constitutional validity of the 1935 act was made and the act upheld in the case of City of Los Angeles v. Aldrich, 8 Cal.2d 541, 66 P.2d 647. That case involved the validity of the act as applied to proceedings to refund the indebtedness of an assessment district lying wholly within the limits of the city of Los Angeles. In the course of the decision in that case (pages 546, 547, 66 P.2d page 649), we said: "It is urged that the act is void because it provides for a refunding pro-

ceeding involving more than one jurisdiction. Where the ad valorem assessment district extends into both incorporated and unincorporated territory, section 5 of the act designates the legislative body which conducted the original proceedings as the body to conduct the refunding proceeding. By section 24, at any tax delinquent sale which is held pursuant to the act, the county is deemed the real purchaser of delinquent property lying within unincorporated area and, as provided by section 25, must levy a limited tax not to exceed ten cents on each one hundred dollars of assessable property, to pay for the lands purchased or to be purchased at such tax sales. It is contended that this contemplates a gift of public money and a pledge of the county's credit to a municipal corporation which has conducted the original proceedings in violation of section 31 of article 4 of the Constitution. The same general answer might be made to this contention as is given in the foregoing cited cases, viz., that such funds are used for a public purpose, for which the county might have used them in the first instance, and are therefore used for the benefit of the county and not of a city or any individual. However, in the present case the improvement district does not extend beyond the territorial limits of the city. Any different answer which might be made to the question in a proper case, pursuant to the provisions of section 31 of the Refunding Assessment Bond Act of 1935 would not render the balance of the act unconstitutional."

[1] We are now met with a case involving the question there left open, namely, whether there is any constitutional infirmity in the application of the provisions of sections 24 and 25 of the act where the district lies within two or more jurisdictions.

By section 24 of the act the city or county is required at any delinquent tax sale to purchase the delinquent property and must pay into the bond redemption fund the amount of the delinquent assessment and interest. It is also required to transfer to the bond redemption fund the amount of any future assessment and interest pending redemption. Section 25, as amended by St.1937, p. 1684, § 25 provides for a special tax levy, not to exceed ten cents on each \$100 of assessable property, for the purpose of paying for the lands purchased, and for any such future assessment. The section then reads: "In the event that the district lies

partly in unincorporated territory of the county and partly within one or more municipalities or lies within two or more municipalities, a certified copy of the resolution determining the amounts of the assessments remaining unpaid upon the security of which the refunding bonds are issued shall be filed * * * and for any such proceeding in which the lands assessed lie in more than one jurisdiction the auditor of the county in which the assessment district lies shall perform the duties imposed upon an auditor under this act and the tax collector of such county shall perform the duties imposed upon a tax collector under this act. In case the lands assessed lie in more than one jurisdiction, in the event of the delinquency in the payment of any assessment levied hereunder and a sale to the State therefore, the county shall be deemed the real purchaser of all parcels sold which lie within unincorporated territory of the county and the city shall be deemed the real purchaser of all parcels sold which lie within the boundaries of the city, and each such city or county must make payment for the lands of which it is deemed the real purchaser, and if there are no available funds in the treasury with which to make such payment the legislative body of such city or county must, at the time of fixing the annual tax rate and levying the taxes to be collected for general municipal or county purposes, as the case may be, levy a special tax upon the taxable property in such city or county, as the case may be, for the purpose of paying for the lands purchased or to be purchased at such tax sales, * * * but not to exceed for each district the bonds of which are refunded ten cents on each one hundred dollars of assessable value in such city or county, as the case may be. Such special tax shall be in addition to all other taxes levied for municipal or county purposes and shall be computed, entered and collected in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes of the city or county, as the case may be."

It is urged that where, as here, territory in two cities is embraced within the assessment district, those provisions of the act are invalid which impose upon the county officials the duties to collect the assessments for the respective cities. It is alleged in the petition that both the city of Los Angeles and the City of Culver City have provided for the assessment and collection of city taxes by the assessor and tax collector of

Los Angeles county. The 1925 act under which the district was organized also provided for the assessment and collection of taxes for the district by the county assessor and tax collector. We perceive no difficulty or invalidity by virtue of the similar provisions of the 1935 act referred to. The fact that the city or county, as the case may be, is required to purchase the delinquent property within its own confines, where the district is within more than one jurisdiction, does not transform into a strictly municipal affair that which was otherwise an affair of the district or a matter of general public concern. The designation of the purchaser at the delinquent tax sales merely specifies the source of the payment of the purchase price for the delinquent properties and is intended as part of the plan for maintaining the solvency of the bond redemption fund. Those provisions, as held in the Aldrich Case, are valid. No invalidity exists merely in providing for the continuation of the assessment and collection of such taxes by the county officials, where that service had previously been performed by them as provided by the act. Undoubtedly the legislature concluded that greater economy and efficiency would result by thus concentrating the performance of those duties.

[2] The respondents next invoke section 11 of article 1 of the state Constitution. They contend that the act is lacking in uniformity of operation where the lands assessed under section 25 lie within more than one city. They argue that the imposition of the special tax levy upon the assessable property in each city will result in double liability. The respondents state: "* * * each of said cities, if funds are not available for said purposes, must levy a special tax not to exceed for each district ten cents on each one hundred dollars of assessable value in such city. In other words, if the district lies within two municipalities the tax limitation is practically doubled."

The respondents have apparently misapprehended the precise function of the ten-cent limitation. Uniformity in imposing the liability on each jurisdiction for the purchase of delinquent lands and payment of future delinquent instalments is not disturbed by the fact that any rate of the special tax levy under ten cents might be different for each of the cities within the district. The rate obviously will vary for each city, depending upon the proportion of delinquencies to the total assessable property within the city. By the provisions of sec-

tion 25 the legislature is not to be deemed to have imposed a tax, but as having placed a limitation upon the permissible special tax levy so that an excessive tax rate will not be imposed when the city without available funds is required to resort to the special tax levy in order to meet its obligations as the purchaser of delinquent property. Contrary to the respondents' contention the city's liability is not doubled, but is uniform in the proportion that the amount of delinquency bears to the assessed value of all property in the city, as further restricted by the ten-cent limitation. The language used by the respondents—"must levy a special tax not to exceed for each district ten cents on each one hundred dollars assessable valuation in such city", referring to the pertinent portion of section 25 hereinabove quoted—obviously relates to the situation where there is more than one district within the city, and not to the situation which the respondents have in mind, namely, where lands of the district lie within more than one city.

[3] There is no constitutional objection to the advancement by the city of funds for the purpose indicated on the ground that the advancement amounts to a gift of public moneys or a pledge of the city's credit. This question was decided in the County of Los Angeles v. Jones, 6 Cal.2d 695, 59 P.2d 489, and City of Los Angeles v. Aldrich, supra, and the cases therein cited.

[4, 5] The foregoing discussion also answers adversely to their contention the respondents' claim that the provision for the special tax levy violates sections 12 and 13 of article 11 of the state Constitution. Section 12 reads: "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." And section 13 provides: "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, superwise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever * * *."

The respondents' theory apparently is that the effect of the provision for a special tax levy is the imposition of a tax by the legislature, or the delegation to county officials to levy municipal taxes. They concede that the county officials do not directly make the tax levy. The validity of the provisions of the act utilizing the functions of the county assessor's and tax collector's office in specified instances as agencies of the municipalities within the district, has hereinbefore been discussed and upheld. Moreover, it is sufficiently obvious without extended discussion that the pertinent provisions of the act were enacted pursuant to power vested in the legislature, that is, by general laws to authorize the appropriate officers to assess and collect taxes for specified purposes. *American Co. v. City of Lakeport*, 220 Cal. 548, 32 P.2d 622.

The respondents have advanced no valid ground for their refusal to perform the duties imposed on them by law and herein specified.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.



11 Cal.2d 438

**GRANT v. SUN INDEMNITY CO. OF
NEW YORK.
L. A. 16604.**

Supreme Court of California.

June 28, 1938.

Rehearing Denied July 28, 1938.

1. Pleading ⚡279(1)

Generally, a supplemental complaint may not be filed where the cause of action is not complete when the suit is commenced.

2. Insurance ⚡141(1)

An insurer may not repudiate a policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for insurer's benefit.

3. Insurance ⚡591½

Where automobile liability policy was destroyed and, upon entry of judgment against assured for injuries to pedestrian who was struck by assured's automobile, in-

surer denied liability under policy and refused to disclose terms of policy or to furnish pedestrian with copy, and pedestrian without knowledge of contents of policy commenced action against insurer before judgment against assured became final, permitting pedestrian, after introduction of policy in evidence during trial, to amend complaint by alleging affirmance of judgment against assured was proper as against contention that action was prematurely brought under policy providing that no action could be brought against insurer until recovery of final judgment against assured.

4. Insurance ⚡665(2)

Evidence supported finding that automobile liability policy was transferred from automobile originally insured to automobile which was involved in accident, as regards insurer's liability for injuries to a pedestrian caused as result of being struck by assured's automobile.

5. Insurance ⚡665(4)

Evidence that brother of one of the assureds under automobile liability policy lived with assureds and drove automobile for them and on occasions drove automobile for own purposes sustained finding that brother was driving automobile with consent of assureds when he struck pedestrian notwithstanding that express consent was not given to brother on that occasion, as regards insurer's liability.

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Minnie Grant against the Sun Indemnity Company of New York on a policy of indemnity insurance issued to Thomas T. Harbeson and wife and binding defendant to indemnify named assured against liability on account of injuries sustained through operation of an automobile. From a judgment for the plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 73 P.2d 615.

Elbert E. Hensley and W. H. Abrams, both of Los Angeles, for appellant.

Paul Taylor and Noel B. Martin, both of Los Angeles, for respondent.

SHENK, Justice.

Appeal by the defendant from a judgment for the plaintiff in an action on a

policy of indemnity insurance issued to Thomas T. Harbeson and Mariam Harbeson.

The policy was issued in 1931 to the Harbesons, husband and wife, when they were the owners of a Studebaker automobile. The policy by its terms bound the defendant to indemnify the named assureds and any person who might drive the automobile with their consent, against liability up to \$25,000 on account of injuries sustained by other persons through their operation of the car. In July, 1932, the Harbesons sold the Studebaker and bought a Chrysler automobile. Herndon Ryon was the minor brother of Mariam Harbeson and lived with the Harbesons. He frequently drove their car for them and at times operated it himself for his own purposes when it was not otherwise in use. On October 7, 1932, while Herndon Ryon was driving the Chrysler and was its sole occupant, he collided with Minnie Grant, the plaintiff herein, and caused injuries to her person. Minnie Grant brought an action against Thomas T. Harbeson, Herndon Ryon, and the latter's father, for damages. In July, 1934, she recovered a judgment for approximately \$6,775 and costs. Before the trial Thomas T. Harbeson died, and judgment was entered against Herndon Ryon and his father for the amount recovered. The defendants in that action prosecuted an appeal which terminated in an affirmance of the judgment in January, 1936. *Grant v. Ryon*, 11 Cal.App.2d 101, 53 P.2d 170. Prior to the time the judgment in that action became final and in November, 1934, Minnie Grant commenced the present action. During the trial and by leave of court the plaintiff filed an amendment to her complaint alleging the affirmance of the judgment in the case of *Grant v. Ryon*. Judgment in the present action was rendered for the plaintiff.

[1] On this appeal it is contended by the defendant that the court erred in permitting the amendment to the complaint. The defendant relies on numerous authorities, such as *Wittenbrock v. Bellmer*, 57 Cal. 12; *McCormack v. North British Ins. Co.*, 78 Cal. 468, 21 P. 14; *Lewis v. Fox*, 122 Cal. 244, 54 P. 823; *Jennings v. Ward*, 114 Cal.App. 536, 300 P. 129; and *Sutherland v. Calif. Highway Ind. Exc.*, 88 Cal. App. 724, 264 P. 278, in support of its contention that a supplemental complaint may not be filed where the cause of action is not complete when the suit is commenced. The copy of the policy introduced in evi-

dence by the defendant provided that the "company shall not be liable to pay any loss, nor shall any action be brought against the company to recover under this policy until a final judgment shall have been recovered against the assured in a suit covered thereby". The defendant urges that the action when filed was premature and that an amendment would be ineffectual for any purpose under the rulings of the cited cases.

[2, 3] The law as stated in the cases relied on is not questioned. However, because of the facts found by the trial court with sufficient evidence to support them, we conclude that those authorities are inapplicable and do not require a reversal of the judgment. It appears that Thomas T. Harbeson lost his life in a fire which consumed his home, and that the fire also destroyed the policy here involved. Upon the entry of judgment against the Ryons in the personal injury action, the insurance company repudiated any liability on account of the judgment and refused to furnish the plaintiff with a copy of the policy or a statement of its terms. The plaintiff, without knowledge of the provisions of the policy, thereupon commenced the present action. It was not until the copy of the policy was introduced in evidence on the trial of the present action that the plaintiff had notice of the special provision hereinabove quoted. It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit. *Farnum v. Phoenix Insurance Co.*, 83 Cal. 246, 262, 263, 23 P. 869, 17 Am.St.Rep. 233; *Hill v. Mutual Benefit Health etc. Ass'n*, 136 Cal. App. 508, 29 P.2d 285; *Continental Ins. Co. v. Wickham*, 110 Ga. 129, 35 S.E. 287; *Royal Insurance Co. v. Martin*, 192 U.S. 149, 24 S.Ct. 247, 48 L.Ed. 385; *Joyce*, the Law of Insurance, 2d ed., vol. 5, sec. 3211. Furthermore, under the facts shown, it may not be said that the trial court abused its discretion in permitting the amendment to the complaint.

[4, 5] The defendant also contends that two findings of the court are not supported by the evidence, namely, the finding that the coverage under the policy introduced in evidence, which designated only the Studebaker car, had been transferred to the Chrysler automobile and the finding

that Herndon Ryon had the implied consent of the Harbesons to drive the Chrysler car at the time of the accident. There is ample evidence in support of these findings. Both the oral and the documentary evidence disclosed the fact of the transfer by the defendant's agent of the policy from the Studebaker to the Chrysler at the time of the purchase of the latter car. The history of the use of the car by Herndon Ryon during his residence with his sister, even though on the particular occasion express consent was not given, is sufficient evidence of their consent to its use by him at that time. *Phillips v. Cuccio*, 5 Cal.App. 2d 520, 42 P.2d 1050.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; HOUSER, J.; CURTIS, J.; LANGDON, J.



27 Cal.App.2d 332

In re MALONEY'S ESTATE.

Civ. 10750.

District Court of Appeal, First District,
Division 1, California.

June 28, 1938.

Hearing Denied by Supreme Court
August 25, 1938.

1. Wills ⚡671

Where one attempting to create testamentary trust fails to indicate either object or persons intended to be benefited thereby, purported trust is fatally defective for uncertainty.

2. Wills ⚡849

Where trust attempted to be created by will is fatally defective for failure to indicate either the object or the persons intended to be benefited thereby, property involved, in absence of valid residuary clause in will, does not go to purported trustee but passes under laws of succession in equal shares to next of kin.

3. Wills ⚡675

Under will making six specific cash bequests and providing in conclusion that testatrix wished one of legatees to "doe wat

she know I like done if any is left," such residuary clause did not make a bequest, but indicated that testatrix sought to create a trust.

4. Wills ⚡675, 849

Where holographic will making specific bequests stated in conclusion that testatrix desired that one of legatees should "doe wat she know I like done if any is left," trust which it appeared testatrix thereby sought to create was fatally defective for uncertainty, and residue was properly distributed to next of kin rather than to purported trustee.

5. Appeal and error ⚡1008(3)

Where construction given instrument by trial court is reasonable and apparently consistent with intent of party making it, reviewing court will not substitute another interpretation, although it seems equally tenable.

6. Wills ⚡487(3)

Oral declarations of testator prior to writing of will do not serve as competent evidence of testator's intention. Probate Code, § 105.

7. Wills ⚡440

The intention of testator to be sought in construing will is not that which may have existed in his mind, but that which is expressed in language of will. Probate Code, § 105.

8. Wills ⚡487(3)

In proceeding to construe will, probate court properly refused to consider testimony concerning oral declarations of testatrix concerning her intentions allegedly made prior to writing will. Probate Code, § 105.

9. Wills ⚡435

The court in construing will would not give will such a construction as would necessitate entry into field of conjecture and amount to rewriting of will.

10. Wills ⚡439

Neither indulgence in speculation nor conjecture concerning what a testatrix' intention was affords a proper basis for a decree of distribution. Probate Code, § 101.

11. Wills ⚡449

A court may not adopt a construction founded on conjecture or supply an omission by rewriting a will in order to avoid a conclusion of partial intestacy. Probate Code, §§ 101, 102.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Sarah Maloney, deceased, for distribution of the estate of the deceased, involving a controversy between Sarah Collins, legatee, and Thomas Maloney and others, heirs at law. From that portion of the decree of distribution, distributing the residue under the will of the deceased to the heirs at law, the legatee appeals.

Affirmed.

Hugh K. McKevitt, of San Francisco, for appellant.

Corbet & Selby, John Selby, and Russel Shearer, all of San Francisco, and Paul Thomas, of Los Angeles, for respondents.

KNIGHT, Justice.

The decedent, Sarah Maloney, a resident of San Francisco for many years, died at the age of seventy-six. She had never been married and her only relatives lived in Kentucky. There are five of them, namely, Thomas, Peter and John Maloney, Catherine Honadel, and Sarah Collins. The latter is a cousin, and the other four are the children of a predeceased brother. Six months before the decedent died she made a holographic will whereby she left \$500 to each of the children of her predeceased brother, \$1,000 to Sarah Collins, \$500 to her church, and concluded the will as follows: "I wish for Mrs. Sarah Collins to doe wat she know I like done if any is left." In due course the will was admitted to probate; but on proceedings for distribution the probate court decreed that as to the residue of the estate, the decedent died intestate; and thereupon, pursuant to the laws of succession, it distributed the residue, amounting to approximately \$5,500, in equal shares to the four children of the deceased brother, as the next of kin. From that portion of the decree of distribution Sarah Collins appealed.

[1, 2] It appears to be well settled that where one attempts to create a testamentary trust, but fails to indicate either the object or the persons intended to be benefited thereby, the purported trust is fatally defective for uncertainty (*Estate of Ralston*, 1 Cal.2d 724, 37 P.2d 76, 96 A.L.R. 953), and in those circumstances the property attempted to be disposed of thereby, in the absence of a valid residuary clause

in the will, goes not to the purported trustee, but passes under the laws of succession in equal shares to the next of kin. *Estate of Ralston*, supra; *Wittfield v. Forster*, 124 Cal. 418, 57 P. 219; *Fay v. Howe*, 136 Cal. 599, 69 P. 423; *Simpson v. Simpson*, 80 Cal. 237, 22 P. 167; *In re Estate of Reith*, 144 Cal. 314, 77 P. 942. And respondents contend, and the probate court in effect held, that such was the situation here.

[3] On the other hand, appellant contends that there is no justification for the conclusion that by the clause above quoted the decedent attempted to create a trust, but that to the contrary it appears from the evidence introduced by appellant at the time of the hearing on distribution that the decedent intended to leave the residue of her estate to appellant absolutely, and that the wording of the residuary clause is legally sufficient to establish such a bequest.

[4, 5] After analyzing the provisions of the entire will in the light of the circumstances under which it was made, we are of the opinion that as the probate court held, said residuary clause created neither a trust nor a bequest. As claimed by appellant, it is at once apparent from the face of the will that the decedent was an uneducated person; nevertheless it will be observed from an examination of the provisions creating the six specific cash legacies that when she intended to make an absolute gift, she had no difficulty whatever in expressing such intention in clear and unmistakable language; that is to say, in each instance she declared: "I leave _____ Dollars to _____", etc. The cash legacy provided for appellant was couched in such language, to-wit: "I leave to my Cousin Sarah Collins * * * one Thousand Dollars." Manifestly, therefore, if in addition to the gift of \$1,000 she had intended to give appellant the residue of her estate she naturally would have employed the same language she used in creating the cash legacy, and simply said, "I leave the rest to Sarah Collins." But, as will be seen, she did not do so. On the contrary, she used language strikingly different, to-wit: "I wish for Mrs. Sarah Collins to doe wat she know I like done if any is left;" which, in our opinion, tends strongly to support the conclusion reached by the probate court that she intended thereby to create some sort of a trust. At all events, such construction ap-

pears to be reasonable, and it is held generally that where the construction given an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable. *Estate of Boyd*, Cal.App., 74 P.2d 1049; *Estate of Bourn*, Cal.App., 78 P.2d 193; *Kautz v. Zurich General Accident & Liability Ins. Co.*, 212 Cal. 576, 300 P. 34.

[6-8] In furtherance of appellant's contention that the decedent intended to make an additional gift to her of the residue of the estate appellant at the hearing introduced testimony of the oral declarations of the decedent as to her intentions, which it is claimed she made just prior to the writing of the will. The probate court received the testimony over respondents' objections, but stated at the time that after all, in the determination of the issue of the decedent's intentions, it would be relegated under the law to the will itself. Appellant now contends that the refusal of the probate court to consider said oral declarations was error; and that said oral declarations being admissible for the purpose mentioned, they constituted convincing proof of the decedent's intentions. Section 105 of the Probate Code provides, however, that when an uncertainty arises on the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it is made, but excluding the oral declarations as to his intentions. And in applying the foregoing rule the courts have often declared in conformity therewith that such oral declarations do not serve as competent evidence of the testator's intentions (*In re Estate of Johnson*, 107 Cal.App. 236, 290 P. 314; *In re Estate of Watts*, 186 Cal. 102, 198 P. 1036); that the intention to be sought for is not that which may have existed in the mind of the testator, but that which is expressed in the language of the will. *In re Estate of Major*, 89 Cal.App. 238, 264 P. 542; *In re Estate of Ogden*, 78

Cal.App. 412, 248 P. 680; *Estate of Bourn*, supra. It follows from the foregoing that there is no merit in appellant's contention.

[9-11] Also in support of her position appellant calls attention to certain general rules of construction to the effect that words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative, and that of two modes of interpreting a will that is to be preferred which will prevent a total intestacy (sec. 102, Probate Code; *In re Estate of Olsen*, 9 Cal. App.2d 374, 50 P.2d 70); furthermore, that the intention of the testator must be given effect as far as possible (sec. 101, Probate Code; *In re Estate of Newman*, 68 Cal.App. 420, 229 P. 898); and in connection with the above rules appellant argues that the language used in the residuary clause in question is equally as forceful in expressing her intention to give Mrs. Collins the residue of the estate as would be the words employed by her in creating the cash legacies. We are of the opinion, however, that to so hold would be to enter the field of conjecture and amount to a rewriting of the testatrix's will; and it is well established that neither indulgence in speculation nor conjecture as to what a testatrix's intention was affords proper basis for a decree of distribution (*In re Estate of Zilke*, 115 Cal. App. 63, 1 P.2d 475); nor is a court permitted to adopt a construction founded on conjecture or to supply an omission by rewriting a will in order to avoid a conclusion of partial intestacy. *In re Estate of Hisey*, 106 Cal.App. 678, 289 P. 889.

With respect to the numerous authorities cited by appellant, it may be stated that we have examined the same but find nothing therein sufficiently in point to warrant interference with the conclusions reached by the probate court herein.

The portion of the decree appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

27 Cal.App.2d 431

PETERSEN v. DONEGANI et al.
Civ. 10599.

District Court of Appeal, First District,
Division 2, California.
July 5, 1938.

1. Brokers ☞38(4)

Evidence sustained finding that plaintiff's alleged agents in real estate transaction were agents of purchaser and were not agents of plaintiff, and did not receive secret profits or defraud plaintiff.

2. Witnesses ☞276

Under statute relating to the calling of an adverse party as a witness, where plaintiff sued for secret profits alleged to have been retained by his alleged agents in a real estate transaction, which action was joined for trial with a similar action by another party against same defendants, refusal to permit plaintiff to examine such other party as an "adverse party" was not error, since fact that one might have good cause of action, and another have none, would not make them of necessity adverse parties. Code Civ.Proc. § 2055.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

3. Appeal and error ☞901
Witnesses ☞79(1)

The determination of the status of witnesses is with the trial court, and until error is shown the appellate court cannot interfere.

4. Appeal and error ☞1048(1)

Where plaintiff sued for secret profits alleged to have been retained by alleged agents in real estate transaction and action was joined for trial with another similar action by another party against same defendants, limitation of examination of coplaintiff and wife in rebuttal, designed to impeach testimony of coplaintiff in relation to his own case by inquiry into irrelevant and cumulative matters, was not error.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Chris Petersen as trustee against Frank Donegani and others, for secret profits alleged to have been retained by defendants while acting as plaintiff's

agent in a real estate transaction. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

R. L. Husted, Aaron N. Cohen, and Sidney Rudy, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for secret profits alleged to have been retained by defendants while acting as his agents in a real estate transaction. An action of a similar nature brought by Ralph Munson was joined for trial before the court sitting without a jury. Munson had a judgment by stipulation. The defendants had a judgment against the plaintiff in this cause from which he appeals.

[1] The trial court found that none of the defendants was at any time acting as agent for plaintiff. This finding is based upon the positive testimony of plaintiff denying any such agency. The trial court found that the plaintiff agreed with the defendants, as agents for the buyer, to sell the property at a fixed price, that the sale was made as agreed. This finding is supported by the only evidence on the issue. It was found that the defendants did not obtain a secret profit and did not cheat or defraud the plaintiff. The only evidence on the charge of a secret profit negated the charge. On the other issues, the plaintiff made no proof at all. His present attack upon these findings simply calls for the time-worn reply that the trial court must pass upon the credibility of the witnesses.

There are only two questions raised by appellant which require consideration—the refusal to permit appellant to examine the plaintiff in the consolidated action under section 2055 of the Code of Civil Procedure, and the claimed error in the exclusion of certain testimony.

[2, 3] On the first question, the appellant cites no authorities and makes no showing of prejudice. The transcript discloses that he was given wide range in his examination of Munson, and that he failed to show that the witness was an adverse party. It is such a party that can be examined under the Code section, but the fact that two parties are separately suing the same defendants for secret profits—the one having a good cause of action, the other having none—does not necessarily make them ad-

verse parties. The determination of the status of the witness is a matter primarily with the trial court, and, until error is shown, this court may not interfere.

[4] Appellant complains of the ruling of the trial court limiting his examination in rebuttal of the coplaintiff and wife. The only showing which he makes on this point is in reference to questions upon irrelevant and cumulative matters. Appellant failed to make a prima facie case in his own behalf. This so-called "rebuttal" was designed to impeach the testimony of Munson in relation to his own case. There is no suggestion of any possible error so far as appellant is concerned.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



27 Cal.App.2d 336

PEOPLE v. LA VERS.

Cr. 2010.

District Court of Appeal, First District,
California.

June 28, 1938.

Hearing Denied by Supreme Court
July 28, 1938.

1. Homicide ☞29

Where accused at the time of the homicide was engaged in a criminal enterprise with a party who fired the shot which resulted in the homicide, the fact that accused did not actually fire the shot did not relieve him from criminal liability for the homicide, as against contention that, at the most, the accused was guilty of a conspiracy.

2. Homicide ☞29

Where two or more persons jointly engaged in an expedition of crime are prepared to kill any person who might interfere with their plans, all are guilty of any crime that is committed as the natural and probable consequence of the enterprise, whether one of them personally commits the act, or whether its commission was the act of any one or more of the associates in carrying out the common purpose.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Jack La Vers was convicted of murder in the second degree, and his conviction was affirmed. Subsequently he presented a motion to the Superior Court to annul and set aside the judgment of conviction on the ground that at most the evidence in the case proved the accused to be guilty only of conspiracy. From an order denying the motion, the accused appeals.

Affirmed.

Jack La Vers, in pro. per.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The appellant Jack La Vers was indicted jointly with one Joe Teresi for the murder of Herbert McAuley, a deputy sheriff, and upon trial he was found guilty of murder of the second degree. He appealed, and the judgment of conviction was affirmed. *People v. La Vers*, 130 Cal. App. 708, 20 P.2d 967. Approximately four and a half years later he presented a motion to the superior court wherein he was convicted, to annul and set aside the judgment of conviction, upon the ground that at most the evidence in the case proved him to be guilty only of conspiracy. He contended, therefore, that since he was neither charged with nor found guilty of conspiracy, his conviction of murder is void. After a hearing the motion was denied, whereupon he took this appeal.

The evidence upon which appellant was found guilty of murder is fully set forth in the decision rendered on the appeal from the judgment. Summarized, the facts appearing therefrom are these: On the night of the murder appellant, Teresi and a man named Kelly, in pursuance of a plan theretofore entered into between them, trailed a Packard automobile carrying illicit alcohol out of Oakland, and when it stopped temporarily at a gasoline station in San Leandro appellant and Teresi alighted from their car, pointed a pistol at the driver of the Packard, and threatened to shoot him if he resisted. Thereupon they jumped in the Packard and fled toward San Jose, taking the driver with them, and declaring as they speeded along the highway that they would kill anyone who attempted to intercept them. Soon after they entered Santa Clara county McAuley and another deputy sheriff named Saporito took up the pursuit, and

appellant and Teresi were aware of the fact that the occupants of the pursuing car were officers. The stolen car was finally overtaken and stopped in San Jose. McAuley approached it from one side and Saporito from the other, and the occupants were ordered to get out. Appellant alighted from one side and Teresi from the other, but as they did so they opened fire on the officers. Teresi shot McAuley, killing him instantly, and appellant shot Saporito in the stomach, but did not kill him. Although critically wounded Saporito grappled with appellant, and during the ensuing struggle Saporito was shot in the leg twice. Finally Saporito succeeded in felling appellant with a blow on the head and wrested appellant's pistol from him. Teresi then called to appellant to flee, and they jumped back into the automobile and drove away. Later they were captured and charged with the murder of McAuley.

[1,2] The same argument now presented by appellant in support of his present motion was urged by him on the former appeal as one of the main grounds for the reversal of the judgment, but it was held to be without merit, the court saying (page 969): "Appellant contends also that under the facts established by the prosecution he was guilty of nothing more than conspiracy because admittedly he did not actually fire the shot that killed McAuley. The contention is frivolous. As already shown, the evidence proves that Teresi killed McAuley while Teresi was engaged in a criminal enterprise with appellant, and it has long since been declared the law of this state that, where two or more persons jointly engaged in an expedition of crime, and as here, are prepared to kill any police officers or others who may interfere with their plans, all are equally guilty of any crime that is committed as the natural and probable consequence of such enterprise, whether one of them personally commits the act or whether its commission was the act of any one or more of the associates in carrying out the common purpose. *People v. Bringhurst*, 192 Cal. 748, 221 P. 897; *People v. Wheaton* [64 Cal.App. 58, 220 P. 451]; *People v. Kauffman*, 152 Cal. 331, 92 P. 861; *People v. Woods*, 147 Cal. 265, 81 P. 652, 109 Am.St.Rep. 151; *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L.R. A. 193; *People v. Vasquez*, 49 Cal. 560." What was there stated in disposing of the point applies with equal force to appellant's motion to vacate.

On the present appeal appellant in elaborating somewhat upon the main point has cited authorities to the effect that conspiracy is a distinct crime; and he then goes on to argue that before one may be imprisoned for that particular crime he must be specifically accused thereof; the accusation must contain certain allegations of fact establishing that crime, and there must be a verdict of guilty based on such accusation. Manifestly, however, neither the authorities so cited nor the argument thus advanced have any application whatever to the present situation for the simple reason that the specific crime here charged was murder and not conspiracy; and while the evidence shows that appellant conspired with others to engage in a criminal enterprise, it also shows that murder was committed as a natural and probable consequence of such criminal enterprise. Therefore, as held on the appeal from the judgments under the authorities therein cited, appellant was properly charged with and found guilty of murder.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



27 Cal.App.2d 364

PEOPLE v. DUTTON.

Cr. 3115.

District Court of Appeal, Second District,
Division 2, California.

June 29, 1938.

Hearing Denied by Supreme Court
July 28, 1938.

1. Criminal law §541

Evidence taken at a preliminary examination may not be used to attack the validity of a judgment founded on an information. Pen.Code, § 1191.

2. Habeas corpus §21

Where evidence at preliminary hearing is insufficient to hold defendant to answer for crime charged, defendant's sole remedy is by timely application for habeas corpus.

3. Criminal law §274

Where no evidence showed that defendant was offered any inducement to plead guilty of issuing a check without sufficient

funds, trial court did not abuse its discretion in refusing to set aside plea although defendant mistakenly believed he would be eligible for probation where he had been pardoned after prior conviction in Wisconsin. Pen.Code, §§ 1168, 1203.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Charles Dutton was convicted of issuing a check without sufficient funds and prior conviction of a felony, his motion, upon return of the remittitur on affirmation of conviction, to set aside his plea of guilty was denied, and he appeals.

Affirmed.

Ben L. Blue, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from an order after judgment denying defendant's motion to set aside his plea of "guilty" to one count of an information charging him with issuing a check without sufficient funds. The information also charged the defendant with a prior conviction of a felony in the state of Wisconsin to which the defendant admitted having served a term of imprisonment in a state prison, but denied that it was a felony. He was thereupon sentenced to the California state prison at Folsom for the term prescribed by law, and the court ordered the judgment to show that the defendant had been pardoned by the governor of the state of Wisconsin as to the offense set forth in the prior conviction. An appeal was taken from this conviction and the conviction was affirmed. *People v. Dutton*, 9 Cal.2d 505, 71 P.2d 218. Upon the return of the remittitur the defendant filed with the court a motion to set aside his plea of "guilty" to count one of the information on the ground that he was and is not guilty of said offense as shown by the evidence taken at the preliminary examination which is set forth in said motion, and requested that a new and different plea be entered, to-wit, a plea of "not guilty." The motion was denied, and from said order this appeal is taken.

[1,2] The appellant contends (1) that the evidence given at the preliminary hearing shows that he is not guilty of the offense charged, and therefore the judgment

is void for lack of jurisdiction, and (2) that defendant's plea of "guilty" was obtained through excusable mistake in that he honestly believed he was entitled to receive probation for the reason that he had been pardoned on a prior conviction set forth in the information.

Evidence taken at a preliminary examination may not be used for the purpose of attacking the validity of a judgment founded upon an information for the reason that the judgment is predicated upon a plea or verdict of "guilty", or a verdict against the defendant on a plea of former conviction or acquittal or once in jeopardy. Sec. 1191, Pen. Code. If the evidence given at the preliminary examination is insufficient to hold a defendant to answer for the crime charged in the information, his remedy is by habeas corpus, if timely made (*People v. Creeks*, 170 Cal. 368, 371, 149 P. 821), for otherwise he is precluded from raising it. (14 Cal.Jur. 78; 7 Cal. Jur. 968).

[3] Appellant next contends that his plea of "guilty" was upon an excusable mistake in that he believed he was entitled to receive probation because he had been pardoned on the offense set forth in the information as a prior conviction and that no decision had ever been rendered by an appellate court in this state determining that although a defendant has been pardoned he nevertheless has suffered a prior conviction within the meaning of sections 1168 and 1203 of the Penal Code. *People v. Dutton*, supra. It must be borne in mind, however, that the court before which came appellant's motion to set aside the plea was the same court before which would have come the appellant's motion for probation, and it is a fair presumption that since the court denied the appellant's motion to set aside his plea it would also have denied the appellant's motion for probation upon the ground of the appellant's former conviction. There is a vast difference between being eligible to apply for probation and being entitled to it. There is nothing in the record which shows that the appellant was offered any inducement or promise to enter a plea of "guilty", but only that he was told by his counsel that he was told by some unknown member of the district attorney's office, and that he believed, that if he entered such a plea and did not put the state of California to any expense in bringing witnesses from New York, that these facts would be viewed favorably by

the court in its consideration of the disposition of the case. There is no violation of the court's discretion shown.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.



27 Cal.App.2d 393

**MARR v. SUPERIOR COURT IN AND
FOR ALAMEDA COUNTY et al.**

Civ. 10843.

District Court of Appeal, First District,
Division 2, California.

July 1, 1938.

Rehearing Denied July 30, 1938.

1. Appeal and error ☞414

An "adverse party," within meaning of statute requiring one appealing to superior court to serve a copy of notice of appeal on adverse party, is a party whose interest in subject matter of appeal is adverse to or will be affected by reversal or modification of judgment or order appealed from. Code Civ.Proc. § 974.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

2. Appeal and error ☞414

An "adverse party," within statute requiring one appealing to superior court to serve copy of notice of appeal on adverse party, is a party whose interest in relation to subject of appeal is in conflict with reversal of order or decree appealed from. Code Civ.Proc. § 974.

3. Appeal and error ☞414

Where separate judgments had been obtained against husband and wife in justice court action to recover on note executed by both, wife was not an "adverse party" upon whom husband was required to serve notice of appeal from judgment adverse to him, since her position would be unchanged by an affirmance, and she would not be prejudiced by a reversal or modification. Code Civ.Proc. § 974.

4. Appeal and error ☞787

The statute requiring superior court to dismiss appeal where appellant fails to bring appeal to trial within one year from

date of filing does not sanction penalty on innocent party for delay rendering it impossible, impracticable or futile to proceed. Code Civ.Proc. § 981a.

5. Mandamus ☞57(1)

The expiration of one-year period during which appeal to superior court should have been heard did not preclude issuance of writ of mandate to compel hearing of appeal, where delay was caused by court's refusal to set appeal for hearing. Code Civ.Proc. § 981a.

Proceeding for a writ of mandate by Robert L. Marr against the Superior Court of the State of California, in and for Alameda County, and another, to compel the respondents to set a cause for trial upon appeal from the justice court.

Peremptory writ issued.

J. Bruce Fratis, of San Francisco, for petitioner.

Hubbard & Hubbard and Charles A. Cogswell, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

In response to an alternative writ of mandate the respondent appeared by demurrer, motion to quash and by answer. No proof was offered upon any of the allegations of the answer, and the order to show cause was submitted on these two issues—whether the service of notice of appeal upon the wife of petitioner was necessary, and whether the lapse of time caused by respondent's refusal to set the appeal for hearing would make a writ of mandate futile.

The agreed facts are that an action was filed in the justice's court against Robert L. Marr and his wife to recover on a promissory note executed by both defendants. The wife consented that judgment be taken against her, but whether the offer was fully accepted is disputed. Separate judgments were entered against both defendants in identical amounts. Robert Marr alone filed notice of appeal from the judgment adverse to him, but did not serve a copy on his wife. In due time Marr made a motion in superior court to set the cause for trial. The motion was denied. Respondent defends the denial upon the sole ground that the appeal was defective because notice was not served upon the wife.

Section 974 of the Code of Civil Procedure provides that "Any party dissatisfied with the judgment * * * may appeal. * * * The appeal is taken by filing a notice * * * and serving a copy on the adverse party."

[1,2] An "adverse party", within the meaning of this section, has been defined as one "whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken". *Senter v. De Bernal*, 38 Cal. 637, 640. In the early case of *Thompson v. Ellsworth*, 1 Barb.Ch. 624, 627, the New York Court, in interpreting the New York statute upon which our code section is based, said that the term "adverse party" referred to one "whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from". Our courts have uniformly held to this definition. See *Randall v. Hunter*, 69 Cal. 80, 10 P. 130; *Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 P. 225; *Jackson v. Superior Court*, 20 Cal.App. 638, 129 P. 946; *MacDonald v. Superior Court*, 101 Cal.App. 423, 424, 281 P. 672. In the *MacDonald* Case it was said that the question is whether the judgment gives the party something which will be taken away by a reversal. If it does so, he is an adverse party. It may be added that, if it does not do so, he is not an adverse party.

[3] Here Mrs. Marr was given nothing by the judgment. All that the plaintiff prayed against her was granted. If the judgment is affirmed her position is unchanged. If it is reversed or modified she could not be prejudiced in any particular. No appeal was taken from the judgment against her; it is a final determination of her liability; and it is beyond the power of the respondent court to alter that liability in any way. Her rights and liabilities both will be unaffected by an affirmance of the judgment against her husband. Her interests might be affected indirectly by a reversal which would relieve her husband from these liabilities and thus enhance the community assets. But this would be because she is a party in concord with, rather than one adverse to, the appellant. Hence, whether the judgment against her husband be affirmed or reversed, she is in no sense an "adverse" party to him on that appeal.

[4,5] Respondent urges that the writ should not issue because, pending the hear-

ing of this application, the year has expired within which the appeal should be heard. Section 981a of the Code of Civil Procedure requires the superior court to dismiss an appeal "where the appealing party fails to bring such appeal to trial within one year from the date of filing". It was said in *Christin v. Superior Court*, 9 Cal.2d 526, 532, 71 P.2d 205, 208, 112 A.L.R. 1153, that the purpose of a similar statute was "to prevent avoidable delay for too long a period". The statute does not sanction a penalty on the innocent party for delay which renders it impossible, impracticable, or futile to proceed. *Kinard v. Jordan*, 175 Cal. 13, 164 P. 894, and *Estate of Morrison*, 125 Cal.App. 504, 14 P.2d 102, approve the same principle.

The demurrer is overruled and the motion to quash is denied. Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.



27 Cal.App.2d 402

In re BARROW'S ESTATE.

KENDRICK et al. v. BARROW.

Civ. 11870.

District Court of Appeal, Second District,
Division 2, California.

July 1, 1938.

1. Trial ☞142

It is the province of the trial court to draw inferences from the evidence and from the facts established thereby.

2. Appeal and error ☞996

If inferences supporting judgment may be drawn from facts established by evidence, reviewing court may not draw inferences contrary to those drawn by trial court.

3. Fraud ☞58(1)

Fraud may be proved by circumstantial evidence.

4. Husband and wife ☞279(2)

In widow's proceeding for cancellation of property settlement agreement between

herself and deceased husband, in which agreement widow waived right to family allowance and other rights, that husband, when agreement was made, secretly intended not to perform his promise, on which widow relied, that he would devise his property equally to his son and to daughter of himself and widow, could be established by circumstantial evidence.

5. Husband and wife ⇨279(2)

Evidence that wife executed property settlement agreement with husband, wherein wife waived right to family allowance and other rights, in reliance on husband's agreement to devise his property equally to his son and to daughter of himself and wife, and that, on the same day, husband made will leaving property to son to exclusion of daughter, authorized cancellation of property settlement agreement following husband's death.

6. Husband and wife ⇨279(2)

Where husband obtained wife's execution of property settlement agreement, wherein wife waived right to family allowance and other rights, by promise which husband had no intention of performing and did not perform, wife, to obtain cancellation of agreement following husband's death, was not required to restore that part of amount received under agreement which she had expended for living expenses during separation of husband and wife and prior to husband's death. Civ.Code, § 1691.

7. Contracts ⇨265

It is not an invariable rule that rescission of a contract on the ground of fraud will be denied merely because parties cannot be placed in statu quo.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Proceeding in the matter of the estate of Thomas M. Barrow, deceased, on the petition of Minnie W. Barrow, his widow, for a family allowance and for cancellation of a property settlement agreement made between decedent and petitioner. The petition was opposed by Victor H. Kendrick, executor of the last will and testament of Thomas M. Barrow, and by Frank E. Barrow. From adverse orders, contestants appeal.

Affirmed.

Victor H. Kendrick, of Los Angeles, for appellant Frank E. Barrow.

Victor H. Kendrick, of Los Angeles, in pro. per.

C. Hughes Jordan and James T. Boyle, both of Los Angeles, for respondent.

WOOD, Justice.

The petitioner, Minnie W. Barrow, widow of Thomas M. Barrow, deceased, filed in the probate court a petition for a family allowance and for cancellation of a property settlement agreement made by petitioner and Thomas M. Barrow during his lifetime. The petition was opposed by the executor of the will of Thomas M. Barrow and by Frank E. Barrow, a son by a previous marriage. The executor and the son have appealed from the orders granting the petition.

In the property settlement agreement petitioner waived various rights, among them the right to a family allowance. The trial court found that decedent induced petitioner to make the agreement by falsely and fraudulently promising and representing to petitioner that he would make a will leaving all his property in equal shares to Frank E. Barrow, the son of decedent, and to Jean Barrow Way, the daughter of petitioner and decedent; that petitioner believed said promise and relied upon it and was thereby induced to execute the agreement; that decedent did not have any intention at the time the promise was made of performing it; that the promise was made with the intent and for the purpose of deceiving and defrauding petitioner. Appellants now contend that these findings are without support in the evidence.

Petitioner and decedent were married in 1905, at which time each owned separate property and decedent earned a salary from his employment in the postal service. Decedent managed the property of both parties until 1919, when petitioner assumed the management of her own property. Thereafter each party acquired certain additional properties and together accumulated certain community property. Decedent became ill with tuberculosis which caused his retirement from the postal service with a pension of \$60 a month. Negotiations were conducted for a formal property settlement and on August 15, 1934, a discussion took place between the parties and their daughter Jean. Petitioner asked decedent to pay her the sum of \$5,000 but decedent offered the sum of \$3,500 in settlement. What took place is related by the daughter: "Well, I came home from school—it was

one day during the week—and, so, the subject of the property settlement came up—my father was very, oh, despondent about these people downstairs moving, and he says, 'I am going to board up the house, I want peace and quiet around here, and I would like to be left entirely alone;' and he says, 'I wish you folks would get out.' And mother said, 'Well, I will if you will give me what I have asked for.' He says, 'Well, what do you want?' She said, 'I would like to have \$5,000;' and he said, 'Oh, hell;' he says 'I haven't got it;' and I said to my father, 'I should think you would be only too glad to give mother what she asks for, all the things she has done for you, you wouldn't be here now if you had not had help.' He said, 'Jean, you remember this agreement is only between your mother and me.' So then I spoke up to my father, and I said, 'Well, what about other things you have besides this house?' I says, 'You have your savings account, you have the rent from the house downstairs and your garage and your pension.' And, so, he said, 'Well, I don't know how long I am going to live or how much my expenses will be; I may have to have nurses and doctors,' but he says, 'If I have anything left I am going to divide it between Frank and you.' He said, 'I don't want to show any partiality.' Then mother spoke up and she said, 'That is fair; if you don't like that I will be willing to split the difference with you and take \$3,750.' My father said 'All right.' So that ended that conversation." Petitioner presented a witness who testified decedent had told her that he had concealed certain property from petitioner and that she would not have signed the agreement if she had known of the concealed property.

A formal property settlement agreement was prepared by decedent's attorney and the agreement was signed in the attorney's office on September 24, 1934. The executed copies of the agreement were retained by the attorney until October 9, 1934, at which time decedent paid to petitioner the balance of the money due her under the terms of the agreement. On October 9, 1934, decedent made a will leaving all of his property to his son. He was ill all the time thereafter and died on December 6, 1935.

[1-5] The record discloses sufficient evidence to sustain the court's findings. It is the province of the trial court to draw inferences from the evidence and from the facts established by the evidence. If in-

ferences supporting the judgment may be drawn from the facts established the reviewing court may not draw inferences contrary to those drawn by the trial court. *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 P. 659. Fraud may be proven by circumstantial evidence. An intention not to perform a promise may be inferred from the facts proven. The conduct of the promisor subsequent to the making of the promise may be proved to show that there was no intention of performing the promise at the time it was made. Direct evidence of a secret intention on the part of the promisor not to perform the promise is not necessary but the question of the actual intent of the promisor at the time he made the promise is to be determined by the trial court from all the facts and circumstances shown in evidence. *Holiday v. Tolosano*, 39 Cal.App. 151, 178 P. 170; *Tench v. McMeekan*, 17 Cal.App. 14, 118 P. 476, 478; *Snyder v. City Bond & Finance Co.*, 106 Cal.App. 745, 289 P. 859; *Williams v. Hasshagen*, 166 Cal. 386, 137 P. 9. In *Wilson v. Rigali & Veselich*, 138 Cal.App. 760, 765, 33 P.2d 455, 457, the court said: "Without the consideration of other evidence, the subsequent failure to perform warrants the inference that appellants did not intend to perform when they promised." The evidence shows that petitioner and decedent were bargaining on the subject of a property settlement and that petitioner agreed to accept \$1,250 less than she had demanded upon petitioner's promise to divide his property equally between his son and daughter. In reliance upon that promise petitioner signed the property settlement whereby she waived her rights to a family allowance. Decedent at that time was over seventy years of age and was suffering from a chronic illness. His expectancy of living was more uncertain than that of the average person. Notwithstanding, he made a will leaving his property to his son to the exclusion of his daughter on the very day the property settlement transaction was completed. Since, according to the supported findings, the property settlement was executed in reliance upon a promise made with intent to deceive, which the promisor had at the time of its making no intention to perform, the trial court was justified in setting it aside.

[6, 7] The appellants contend that petitioner did not make a sufficient offer to restore. The offer to restore was made in the language of section 1691 of the Civil

Code. It was shown by the evidence that petitioner had used the sum of \$546.50 for living expenses during the separation of the parties and prior to decedent's death and was unable to restore the full amount received by the property settlement. She did restore by a deposit with the clerk the sum of \$3,203.50. The answer to appellants' contention is to be found in the following quotation from *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 83, 227 P. 715, 718: "It is not an invariable rule that a rescission of a contract on the ground of fraud will be denied merely because the parties cannot be placed in statu quo. *Green v. Duvergey*, 146 Cal. 379, 80 P. 234. It would be manifestly unjust to require of the wife, as a prerequisite to maintaining an action to rescind a property settlement agreement on the ground of fraud, that she restore to the husband the moneys received by her under the agreement and used for living expenses and to which under the law she would have been entitled to so receive and use notwithstanding the agreement. *Milekovich v. Quinn*, 40 Cal.App. 537, 181 P. 256."

The orders are affirmed.

We concur: CRAIN, P. J.; McCOMB, J.



27 Cal.App.2d 343

EDDLEMON v. EDDLEMON.

Civ. 2226.

District Court of Appeal, Fourth District,
California.

June 28, 1938.

1. Divorce ☞298(1)

The custody of a minor child of divorced parents may not be given to a stranger unless the parent seeking custody is found unfit to have such custody.

2. Divorce ☞298(1)

The granting of custody of seven-year-old child of divorced parents to the child's paternal grandmother and the denial of custody of child to her mother was error, in absence of a finding that the child's mother was not a fit person to have custody of the child.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Suit by Jean Griffin Eddlemon against Joel Richard Eddlemon for divorce wherein defendant filed cross-complaint. The divorce was granted and custody of the 7-year-old child of the parties was awarded to the child's paternal grandmother after stipulation to that effect by the parents. Subsequently an order was issued directing the grandmother to show cause why the custody of the child should not be awarded to the mother. From an order denying the mother custody, and continuing the custody of the child in the grandmother, the plaintiff appeals.

Order reversed.

Wagy & Hulsy, of Bakersfield, for appellant.

MARKS, Justice.

This is an appeal from an order awarding the custody of Volene Jo Ann Eddlemon, a minor of the age of seven years, to Sallie Ida Eddlemon, her grandmother.

Volene Jo Ann Eddlemon is the daughter of Jean Griffin Eddlemon and Joel Richard Eddlemon. They were finally divorced on November 5, 1935. The interlocutory decree of divorce gave the custody of the child to the grandmother after a stipulation to that effect by the parents. The final decree of divorce continued this order. Except for the time intervening between February 29, and November 23, 1936, custody of the child has been continued in the grandmother. The record shows that the grandparents have given the child a good home and excellent care.

Based on numerous supporting affidavits, an order to show cause was issued on June 29, 1937, directing the grandmother to show cause why the custody of the child should not be awarded to the mother. A hearing was had and on August 24, 1937, the mother was denied custody of her daughter. Custody of the child was continued in the grandmother. This appeal is from that order.

The undisputed evidence shows that the mother was a fit and proper person to have the custody of her daughter, that she was financially able to provide for her and that the home she proposed to provide in Bakersfield was suitable. There is similar proof of the qualifications and home of the grandmother. We have here a contest between a mother and a grandmother, both of whom

desire the custody of the minor, both of whom are fit persons to care for the child and both of whom propose to properly provide and care for her. There was no evidence of abandonment of the child by the mother. While the grandparents largely provided for the support of the child, they did not request any contributions to this support from the mother. The trial court made no finding that the mother was unfit to have the care, custody and control of her daughter.

[1] The question here presented has been before our courts in the cases of *Newby v. Newby*, 55 Cal.App. 114, 202 P. 891, and *Stever v. Stever*, 6 Cal.2d 166, 56 P.2d 1229, in both of which it was held that before a court can take the custody of a minor child under the age of fourteen years away from its parent and place it in a stranger (in the *Stever Case*, in its grandparents) it must find that the parents seeking custody of the child is unfit to have such custody.

[2] These cases are controlling here. As there is no finding that the mother is unfit to have control of her minor daughter the trial court should not have deprived her of that custody by placing it in the grandmother.

The order is reversed.

I concur: BARNARD, P. J.



27 Cal.App.2d 240

WIRES v. LITLE.*

Civ. 11793.

District Court of Appeal, Second District,

Division 2, California.

June 23, 1938.

Rehearing Denied July 18, 1938.

Hearing Denied by Supreme Court

Aug. 22, 1938.

1. Appeal and error ☞927(3)

On motion for nonsuit, trial court must assume that all evidence in plaintiff's favor is true and every favorable inference fairly deducible from evidence and every favorable presumption fairly arising from evidence must be drawn in plaintiff's favor.

2. Physicians and surgeons ☞18(8)

Generally, in cases of malpractice it must be shown by expert testimony that

damages suffered by plaintiff resulted from failure of defendant to possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the locality.

3. Physicians and surgeons ☞18(8)

Even in actions for malpractice, jury can consider without testimony of experts matters which are within common knowledge of mankind.

4. Evidence ☞14, 20(1)

It is common knowledge that a needle accidentally embedded in a finger might cause infection if not promptly extracted, that a clear X-ray picture would be of assistance to the surgeon, and that if indistinct picture be secured from a dental office an effort should be made to secure a clear picture from those equipped with apparatus for that purpose.

5. Physicians and surgeons ☞18(9)

In action against physician for malpractice in attempt to extract needle embedded in right ring finger of a seamstress, which finger was subsequently amputated, evidence required submission to jury of issue whether physician failed to possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the locality.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Nella Marie Wires against Dr. Elmer W. Litle to recover damages caused by defendant's alleged malpractice. From a judgment of nonsuit and an order denying a motion for new trial, plaintiff appeals.

Judgment reversed and attempted appeal from order dismissed.

Morris Lavine, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

WOOD, Justice.

The plaintiff seeks by this action to recover damages which she alleges were caused by the malpractice of defendant. The action was tried with a jury and upon the termination of plaintiff's evidence the trial court granted a motion for a nonsuit. Plaintiff appeals from the judgment thereafter entered.

*Hearing denied by Supreme Court 82 P.2d 388.

According to the evidence presented by plaintiff, she was working on Saturday, March 2, 1935, as a seamstress and accidentally ran a needle into her right ring finger through the second joint, where part of it became imbedded. She was taken to the office of defendant, a physician, who was asked to remove the needle. It was shortly after noon and defendant was about to leave his office, but he stated that he was familiar with that type of case and would have no trouble in removing the needle. At the time plaintiff went to defendant's office her hand was discolored by a dark stain from the goods upon which she had been working. Defendant did not wash the finger or hand but swabbed the finger with a liquid which he stated was iodine. Defendant tried to locate the needle with a Zio-Lite, but was not able to do so. He sent plaintiff to Dr. Ekes, a dentist in the building, who had X-ray equipment for taking pictures of teeth. An X-ray picture was taken, but it was not clear or distinct. Dr. Ekes stated that the picture was not clear because it was wet and that it should have been allowed to stand for some time after being washed, but that this was not done because of the shortness of the time. He also stated that "it was not very clear and distinct, because I am not in the habit of taking X-rays, only of matters of dentistry". Although the needle could not be seen from the picture that was taken, no effort was made to secure another picture. Defendant made an incision in the finger and probed for the needle for from four to five minutes without locating it. He put some gauze in the wound to establish drainage, stitched up the side of the incision and bandaged the finger and hand. He gave plaintiff a box of pills to relieve pain and sent her home with instructions to come back the following Monday morning in order to get X-ray pictures. He gave her no further advice or instructions.

Saturday evening the hand became very painful and on Sunday efforts were made to telephone to defendant, but he could not be located. The finger and hand became swollen and in order to relieve pain plaintiff cut the bandages. She became feverish and ill. Plaintiff was taken on Monday morning to Dr. Henderson, who found evidence of infection. An X-ray picture was taken and plaintiff was sent to a hospital, where her hand was put under a fluoroscope and the needle was extracted. Her arm became swollen up to the shoulder and she was treated by Dr. Henderson for two

or three weeks, after which time she was sent to the General Hospital, where her finger was amputated.

Dr. Henderson testified that plaintiff was suffering from blood poisoning and that although the infection was present when the needle entered the finger, it could not be controlled otherwise than by subsequent treatment and the removal of the needle accompanied by free bleeding and washing reduces the possibility of infection. He further testified that plaintiff's general physical condition was not good in that her resistance was low, that she "appeared to be tired and exhausted and worn out from probably a little too continuous hard work".

Dr. Burnight qualified as a medical expert. He testified that he was acquainted with the usual and customary practice in this type of case in Los Angeles; that the effect of leaving a needle in the finger of a person in a rundown condition would be to cause trauma or injury to the tissue and that if allowed to remain it would undoubtedly set up infection; that the leaving of the needle in the tissue was the primary cause of the infection and that as it became more advanced it would develop gangrene. He further testified that it is the usual and ordinary custom in this community to take an X-ray of a finger before it is incised for the purpose of removing a needle; that where an X-ray is faded and the needle is entirely incased in the finger and not visible to the eye, it would not be the customary and usual practice in this community for a doctor to cut and incise the finger relying upon that type of an X-ray; that due to the infection, and pressure from the swelling, all the tissues and blood vessels in the immediate vicinity would become infected and deteriorated so as to stop the natural flow of the blood stream, resulting in gangrene; that when gangrene sets in amputation is necessary to save the life of the patient.

[1-4] The rules to be applied in the case of a motion for a nonsuit are too well established to require the citation of authority. The trial court must assume that all the evidence in plaintiff's favor is true and every favorable inference fairly deducible from the evidence and every favorable presumption fairly arising from the evidence must be drawn in plaintiff's favor. Measured by these rules it must be held that the issues should have been submitted to the jury. We are not unmindful of the general rule, which is relied upon by de-

fendant, that in cases of malpractice it must be shown by expert testimony that the damages suffered by plaintiff resulted from the failure of the defendant to possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the locality. The testimony of the experts in the case now before us was sufficient to meet the requirements of the general rule, considered in connection with the facts established by the lay witnesses. Even in actions for malpractice the jury can consider without the testimony of experts matters which are within the common knowledge of mankind. Although it is necessary that experts be called to establish matters peculiarly within the knowledge of experts there are also "facts which may be ascertained by the ordinary use of the senses of a nonexpert". *Barham v. Wid-ing*, 210 Cal. 206, 291 P. 173, 176. If the defendant had undertaken to remove a needle from the ring finger but had made an incision in the thumb it could not be successfully argued that an expert witness would be necessary to establish negligence. In *Rankin v. Mills*, 207 Cal. 438, 441, 278 P. 1044, 1045, the court stated: "Expert testimony appears in the record to the effect that, under such conditions, and in view of the fact that no improvement occurred in the limb under the treatment for dislocation of the hip, the next step, logically and scientifically, was to investigate further the nature of the injury by taking X-ray pictures. Indeed, this would seem so obvious as to be a permissible inference without expert testimony on the subject, as would be the conclusion that a failure to do this was negligence." See, also, *Thomsen v. Burgeson*, Cal.App., 79 P.2d 136; *Evans v. Roberts*, 172 Iowa 653, 154 N.W. 923. It might be well argued that it is a matter of common knowledge that a needle accidentally embedded in the finger of a seamstress might cause infection if not promptly extracted; that a clear X-ray picture would be of assistance to the surgeon; and that if an indistinct picture be secured from a dental office an effort should be made to secure a clear picture from those equipped with apparatus for that purpose.

[5] Plaintiff complains that the trial court unduly curtailed the examination of the expert witnesses. In several instances the court erroneously sustained objections to plaintiff's questions. It would prolong

this opinion unnecessarily to set forth the various questions, a number of which, being hypothetical, were quite lengthy. Upon a new trial it is to be assumed that the rulings on the admission of evidence will be correctly made. For the purposes of this appeal it is sufficient to state that if a verdict had been rendered in plaintiff's favor it would have found ample support in the evidence admitted.

The judgment is reversed. The attempted appeal from the order denying a motion for a new trial is dismissed.

We concur: CRAIL, P. J.; McCOMB, J.



27 Cal.App.2d 236

PEOPLE v. LOOMIS.

Cr. 3104.

District Court of Appeal, Second District,
Division 2, California.

June 23, 1938.

Rehearing Denied July 8, 1938.

1. Criminal law ☞1160

On appeal by defendant from order denying motion for new trial on ground evidence was insufficient to sustain verdict, all intendments are in favor of upholding judgment of trial court.

2. Criminal law ☞511(2)

Any substantial evidence, not that of accomplice, which tends to connect defendant with commission of offense is "corroboratory proof" of testimony of accomplice.

3. Criminal law ☞511(1)

Corroboratory proof of testimony of accomplice supported convictions of burglary and forgery.

4. Criminal law ☞494

Testimony of three physicians that defendant was sane and was feigning insanity supported finding that defendant was sane.

5. Criminal law ☞590(2)

Where more than five months elapsed from time defendant was arraigned until he was tried, during which time he was represented by counsel, and at trial was repre-

sented by Public Defender, refusal to grant defendant continuance to prepare for trial was not reversible error.

6. Criminal law Ⓒ637

Where defendant persisted in shouting profane expressions in presence of court and jury, in breaking away from officers, in kicking counsel's table, and in throwing himself on floor, feigning insanity, despite repeated admonitions from court, confining defendant to wheel chair, and placing towel over defendant's mouth, was not improper.

7. Jury Ⓒ12(2)

The constitutional provision that right of trial by jury shall remain inviolate applies only to ordinary criminal and civil cases where an issue of fact is raised by pleadings. Const. art. 1, § 7.

8. Jury Ⓒ21(6)

Proceeding under statute to determine insanity is not "criminal action," as respects a defendant's constitutional right to jury trial, for defendant is chargeable with no criminal act, nor would he be subject to punishment if found to be insane. Pen.Code, §§ 15, 1368; Code Civ.Proc. § 22.

[Ed. Note.—For other definitions of "Criminal Action," see Words & Phrases.]

9. Jury Ⓒ21(6)

Proceeding under statute to determine insanity is not "civil action," as respects defendant's constitutional right to jury trial, since it is not prosecuted by one party against another for declaration, enforcement, or protection of right, or redress or prevention of wrong. Code Civ.Proc. § 30; Pen. Code § 1368.

[Ed. Note.—For other definitions of "Civil Action, Case, Suit, etc.," see Words & Phrases.]

10. Jury Ⓒ21(6)

The statute relative to determining defendant's insanity is constitutional, notwithstanding jury trial is not provided unless trial is demanded, since constitutional guarantee of jury trial applies only to ordinary criminal and civil cases where an issue of fact is raised by pleadings, and has no application to special proceeding provided by the statute. Code Civ.Proc. § 23; Pen.Code § 1368; Const. art. 1, § 7.

Alfred Merritt Loomis was convicted of burglary and forgery, and he appeals. Affirmed.

Alfred Merritt Loomis, in pro. per.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This appeal is taken from judgments of conviction on one count of burglary and three counts of forgery, as well as two prior felony convictions, and from an order denying a motion for a new trial. The defendant entered, in addition to a "not guilty" plea, a plea of "not guilty by reason of insanity". On the issue of his sanity, the jury found the defendant sane.

Appellant's principal contention is that the evidence is insufficient to sustain the verdicts, coupled with the claim that the verdicts rest solely upon the uncorroborated testimony of an accomplice. The evidence discloses that on Friday, August 27, 1937, the construction office which defendant was charged with having burglarized was locked and the windows were unbroken. On Monday, August 30th, two windows were found broken and it was discovered that thirty numbered checks were missing. Between August 27th and September 1st, two of the missing checks were cashed by appellant and one by a codefendant, who pleaded guilty. It was shown that the checks were not signed by the construction company against whose account they purported to be drawn and a handwriting expert testified that they were made out and signed by appellant, whose handwriting he had compared with that on the checks. The codefendant testified that on the evening of August 27, 1937, he drove appellant to the construction office and that he, the codefendant, then went away because he understood that appellant was going to get some checks. Later appellant picked up the codefendant and took him to an apartment house where he exhibited the thirty checks which had been stolen from the construction company office. At that time appellant wrote out the three checks which he and the codefendant later cashed.

[1-3] Viewing the evidence in a light most favorable to the People, respondents herein, as we are constrained to do under the familiar rule that all intentions are in favor of upholding the judg-

ment of the trial court (*People v. Dukes*, 90 Cal.App. 657, 266 P. 558), there was sufficient, substantial evidence to support the verdicts of the jury. Under the rule that corroboration is to be found in any substantial evidence, not that of an accomplice, which tends to connect defendant with the commission of the offense charged (*People v. Baker*, Cal.App., 76 P.2d 111), we believe that in the instant case there was sufficient corroboratory proof of the testimony of the accomplice.

[4] With regard to the verdict on the insanity plea, it is sufficient to note that three competent physicians testified, after examining appellant, that he was sane and that he was only malingering and feigning insanity.

[5] Appellant contends that the trial court committed reversible error in refusing to grant him a three day continuance in order to allow him time to prepare for trial. There is no merit in this contention, for the record shows that he had ample time to prepare for trial. A period of more than five months elapsed from the time defendant was arraigned until he was actually tried. At all times during said period, appellant was represented by counsel and, at the time of trial, was represented by the Public Defender.

[6] It is next contended that the trial court erred in unduly restraining the appellant during the course of the trial. The restraint complained of consisted of strapping appellant's arms and legs together, his body being strapped to a wheel chair, and at times, a towel being placed over his mouth. Such restraint was ordered because of appellant's loud and tumultuous conduct during the early part of the trial. In the presence of the court and the jury, appellant repeatedly shouted in a loud voice, using profane and obscene expressions. Appellant, on numerous occasions, broke away from, and fought with the officers who were seeking to quiet him, kicked the counsel table, threw himself on the floor and otherwise conducted himself in an improper manner. Despite repeated admonitions from the court, he persisted in such conduct until restrained by order of the court. There can be no doubt

as to the right of the court to use reasonable restraint in order to conduct the trial in an orderly and dignified manner. *People v. Kimball*, 5 Cal.2d 608, 55 P.2d 483. The restraint here used was not unreasonable under the circumstances.

[7-10] The final point raised by appellant is that section 1368 of the Penal Code is unconstitutional in that it deprived him of the right to a trial by jury. That section provides, essentially, that the question of present sanity shall be tried by the court without a jury, unless a jury be demanded. The question arises because of the fact that about two weeks prior to the actual trial, the court declared a doubt as to appellant's present sanity and ordered a hearing thereon. At this hearing, although appellant was represented by counsel, no objection was made to a nonjury trial and, in fact, no jury trial was demanded. Appellant's position is untenable for the reason that the provision of article 1, section 7, of the Constitution of the state of California, which provides, "the right of trial by jury shall be secured to all, and remain inviolate," applies only to ordinary criminal and civil cases where an issue of fact is raised by the pleadings. *Ex parte O'Connor*, 29 Cal.App. 225, 232, 155 P. 115. The proceeding under section 1368 is not a criminal action, for the defendant is charged with no criminal act, nor would he be subject to any punishment if he is found to be insane. Pen.Code, sec. 15, and Code Civ.Proc., sec. 22; *People v. Trippell*, 20 Cal.App.2d 386, 67 P.2d 111. Clearly it is not a civil action, for it is not prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong. (Code Civ.Proc., sec. 30.) The action here under consideration is a special proceeding (Code Civ.Proc., sec. 23), to which the guarantee of the right of trial by jury, provided for in the Constitution, has no application. *Ex parte O'Connor*, supra; *In re Liggett*, 187 Cal. 428, 202 P. 660.

For the foregoing reasons, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

27 Cal.App.2d 381

PEOPLE v. OLLINGER.
Cr. 3110.

District Court of Appeal, Second District,
Division 2, California.

June 30, 1938.

Hearing Denied by Supreme Court
July 29, 1938.

1. Criminal law $\S$ 776(1)

In grand theft prosecution, refusing defendant's requested instruction regarding character evidence introduced by defendant only was error, where court failed to give any instruction covering that subject.

2. Criminal law $\S$ 1186(4)

Error in refusing defendant's requested instruction as to character evidence, introduced by defendant only, was insufficient to justify reversal of conviction for grand theft, in view of general instructions that jury was sole judge of weight of evidence and that witnesses were presumed to speak truth and clear and convincing direct evidence of defendant's guilt. Const. art. 8, $\S$ 4 $\frac{1}{2}$.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

F. E. Ollinger was convicted of grand theft, and he appeals.

Affirmed.

John C. Kleber and Martin Korstad, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The appellant, having been convicted in 1933 of the crime of grand theft, now takes this appeal from the judgment of conviction which was subsequently entered in 1938.

Following his conviction in 1933, and before pronouncing of judgment and sentence, appellant applied for, and was granted probation for a five-year period, the court ordering all proceedings to be suspended until termination of the period of probation. Before the five-year period would have terminated, appellant violated the terms of his probation, the judgment from which this appeal is taken was entered and appellant sentenced to imprisonment.

[1, 2] The sole point which we are called upon to decide is whether or not the trial court committed prejudicial error in refusing to give to the jury certain instruc-

tions requested by the appellant, covering the law relating to character evidence. No other instructions were given on this point. In this respect, it should be noted that the charge of grand theft was substantiated by evidence that appellant either embezzled certain funds, or by means of false or fraudulent representations or pretenses obtained certain funds. Appellant introduced the testimony of several character witnesses to the effect that his reputation for truth, honesty and integrity in the community in which he lived, was good. No evidence of appellant's bad reputation for truth, honesty and integrity was introduced by the prosecution, so that the sole evidence before the jury as to appellant's reputation for these traits was favorable to appellant—there was no conflict. The requested instructions are not set forth herein for the reason that, though correctly stating the law applicable to character evidence and therefore erroneously refused by the trial court, we believe such error insufficient to justify a reversal.

As indicated before, the only evidence before the jury on the point involved herein, was that of appellant's good character. The jury was instructed that it was the sole judge of the weight of the evidence, that it was to determine all questions of fact and that the witnesses were presumed to speak the truth. Though the court failed to give the requested instructions, or any covering that subject, we must assume that the jury, under the general instructions above noted, considered the character evidence in arriving at its verdict of guilty.

The complaining witness, who was a music teacher, testified that she had met this defendant about fifteen years previous to the trial herein, but that she did not "know him" until about two years ago; that during the last week of April this defendant called her on the telephone and asked if she would be interested in a boat cruise, and he said he had two friends of his from Seattle who were here who had a boat they had purchased and that they had put their fortune in it. They were going to take a six months' cruise to the South Seas, and would I be interested in it? In May, this defendant, pursuant to an appointment made with the complaining witness, came out to her house with the other defendants. At that time this defendant introduced the other two defendants as friends of his from Seattle who had charge of the cruise to the South Seas, explaining in detail the proposed itinerary which they showed her

upon a printed form. The elder defendant, Sterling stated to her that they had been very wealthy and had put \$150,000 of their own money in the "Calawaii", but that they needed \$3,000 for "tag ends". She did not give any of the defendants any money at this meeting, however. At a third meeting Mr. and Mrs. Bailey, acquaintances of the victim, were present, Mrs. Bailey having been invited over to interview the defendant Sterling with regard to obtaining employment as beauty operator on said ship during said cruise. Both of said Baileys also testified that on that occasion this defendant stated that \$150,000 had been paid for the "Calawaii", and the other defendants nodded their heads as if to verify the statement. Two of the victim's sons corroborated her testimony. One of them was to be employed as orchestra leader on the cruise. The complaining witness delivered her check for \$3,000. At that time the complaining witness believed that the three defendants had paid the sum of \$150,000 for the "Calawaii" and that the defendant Sterling owned said ship and was going to take a trip to the ports designated by them, and that the complaining witness was to go on said trip, and that her son was to be made orchestra leader on the boat during its cruise. A little later, after further importunities upon the part of defendants, the complaining witness advanced an additional \$3,000, likewise in the belief that defendants were the owners of said ship and that she was to take said six months' cruise on it to the South Seas.

The truth was that the defendants had not purchased said ship. It was owned by the Los Angeles Steamship Company. Three days after the defendants had obtained the first \$3,000 from the complaining witness, the defendant Sterling addressed a letter to the owner's ship brokers offering to purchase said ship for \$75,000, and accompanied said letter with a check for \$500, and promised to pay an additional \$4,500 within thirty days "which will constitute the balance of \$5,000 paid as an option to purchase". Said \$500 was part of the first \$3,000 obtained from the complaining witness herein. No other sums than said \$500, were ever paid. The option was therefore lost and so was the complaining witness' money. The evidence is direct, not circumstantial, and it is clear and convincing of the defendants' guilt. In view of the evidence, it is not at all probable that any other verdict would have been returned had

the instructions under discussion been given.

Looking at the entire cause, it appears that appellant was willing to accept probation on the condition that he reimburse the complaining witness for the amount of funds which he had taken. Now, having failed to make any reimbursement whatever, he asks that we reverse the judgment because of an error in refusing to give an instruction.

After an examination of the entire cause, including the evidence, we do not feel justified in holding such error to be reversible for it has not resulted in a miscarriage of justice as contemplated by article 6, section 4½ of the Constitution.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



26 Cal.App.2d 664

HUBBERT et al. v. AZTEC BREWING CO.

Civ. 2031.

District Court of Appeal, Fourth District,
California.

June 28, 1938.

1. Negligence ⇨121(2)

Where all agencies to which an accident could reasonably be attributed were under the defendant's control, the doctrine of *res ipsa loquitur* is equally applicable whichever agency actually caused the accident.

2. Negligence ⇨121(2)

Under doctrine of *res ipsa loquitur*, evidence is not required to exclude any other inference than that defendant negligently handled instrumentality which caused the accident.

3. Negligence ⇨121(2)

Under doctrine of *res ipsa loquitur*, inference of negligence is permitted, where there has been an accident of sort that does not usually occur where due care is used, and where it appears that instrumentality which caused the accident was under the exclusive control of the defendant.

4. Negligence ☞121(2)

Under the doctrine of *res ipsa loquitur* the particular instrumentality that caused the accident is not necessarily required to be pointed out, if it is shown that every instrumentality to which the accident could with reasonable probability be attributed was under the defendant's control.

5. Negligence ☞121(2)

The doctrine of *res ipsa loquitur* can only apply when the defendant has exclusive control of the instrumentality causing the injury, and cannot apply when the accident may as well have been due to one or more causes over which defendant had no control.

6. Negligence ☞121(2)

Circumstantial evidence may suffice to establish control by defendant of the instrumentality causing an accident so as to lay the foundation for the inference of negligence under the doctrine of *res ipsa loquitur*.

7. Negligence ☞121(2)

The doctrine of *res ipsa loquitur* is inapplicable where the establishment of exclusive control of the agency causing the accident must rest on inferences which are so far from necessary that the contrary inferences are at least as tenable as the inference of negligence.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 80 P.2d 185.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellants.

Mathes & Sheppard, of Los Angeles, and Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

PER CURIAM.

We have given due consideration to the petition for rehearing filed by appellants. It is therein claimed that the statement of facts contained in our opinion is in various particulars incomplete and inaccurate. As respects its comprehensiveness, while it would obviously be out of the question within any moderate space to recite at large the contents of 944 pages of typewritten transcript, we do not think that we have omitted anything essential to a statement of

the evidence on which the conclusions to be reached necessarily depend. As respects asserted inaccuracies in the somewhat extended statement of facts there contained, we have carefully rechecked the opinion with the record and heretofore caused the correction of the only two inaccuracies which we are able to discover, neither of which in fact affected our reasoning. Most of the others asserted to exist amount merely to the omission in some particular connection of matter which is fully stated elsewhere in the opinion, or else to an apparent misapprehension of what we have said. An example of the latter is counsel's comment on our statement with respect to bottled gas, wherein, after noting that it was piped to the outside of each vat, we added (80 P.2d 195): "We are aware of no evidence that there was, on the day of the explosion, any device attached and thereby made available at vat 14 for conducting it into that vat." Counsel seems to think that we were in that connection talking, not about bottled gas but about acetylene, to which we had shortly before referred, and call our attention to the testimony of Assistant Fire Chief Courser (disputed by other witnesses) that a hose connected vat 14 with the acetylene tank, all of which is, as a matter of fact, fully noted and taken account of elsewhere in the opinion. Many of the complaints made of our review of the facts have to do not so much with what is stated as to the stress which we have placed on some phase of the case as compared with some other phase of it. As to these matters counsels' objection is in reality related not so much to what we have said about the facts as to the view we take of the law.

[1-5] When we come, then, to the legal questions involved, the gist of the discussion centers about what application is to be given to the doctrine of *res ipsa loquitur*. Appellant insists that the case is governed by the authority of *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146, and the subsequent cases which have applied its principles, and objects that, though we have recognized that decision as stating the law, we have said that the instant case is a different one without pointing out the difference. The distinction seems to us entirely clear. *Judson v. Giant Powder Co.* involved no situation in which it could be claimed either that the plaintiff or anyone else, except the defendant, had any control over any of the instrumentalities to which

the explosion could be reasonably attributed. In these circumstances it was held unnecessary to show to what one of the various agencies controlled by the defendant the accident was attributable. If all agencies, in other words, to which the explosion could reasonably be attributed, were under the defendant's control, the doctrine *res ipsa loquitur* would be equally applicable, whichever one actually caused the explosion. Contrariwise, in the instant case it might readily have been believed from the evidence that the inflammable substance involved was gasoline and that both it and the agency which ignited it were under the control of the decedents or one of them. The jury indeed rejected this hypothesis, as it was its right to do, but the circumstance that, as an hypothesis, it was available and tenable seems to us radically to distinguish the case from the line of authorities represented by *Judson v. Giant Powder Company*, *supra*, and to throw it into an entirely different category from them. It is further insisted, however, that our opinion rests "on a discredited application of the doctrine *res ipsa loquitur*", namely, that the doctrine "is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others". (80 P.2d 197.) We are not aware that we have announced any such view, though we did quote from the comparatively recent case of *Biddlecomb v. Haydon*, 4 Cal.App.2d 361, 364, 40 P.2d 873, wherein *Lucid v. E. I. Du Pont, etc., Powder Co.*, 9 Cir., 199 F. 377, L.R.A.1917E, 182, is cited to that effect. There is, however, a wide distinction between demanding as a requisite to the application of the doctrine *res ipsa loquitur* that the instrumentality which caused the accident shall have been under the exclusive control of the defendant, and demanding that the evidence exclude any other inference than that the defendant negligently handled it. It is of course true that though an agency be under a defendant's exclusive control and though the accident be one which in the usual course of things does not occur when ordinary care is used, there remains a possibility that the occurrence was not due to the defendant's fault. As against that possibility, however, the doctrine *res ipsa loquitur* permits the jury to infer negligence. When however, the instrumentality itself is not clearly within the exclusive control of the defendant the situation is different. Since the general rule is that the occurrence of an

accident in itself raises no presumption of negligence, dependence must be had on some inference in addition to the fact that there was an accident, and manifestly it must be an inference additional to the further fact that the accident was one of a sort that does not usually occur where due care is used. That inference may be entertained though no specific act of negligence be proved if, in addition to the circumstances just noted, it appear that the instrumentality which caused the accident was under the exclusive control of the defendant. If it was not under his exclusive control manifestly the inference may not be entertained. Such cases as *Judson v. Giant Powder Co.*, *supra*, are undoubtedly authority for the proposition that the particular instrumentality that caused the accident does not necessarily need to be pointed out but, as said in our opinion, if it be shown that every instrumentality to which the accident could with reasonable probability be attributed was under the defendant's control, that is for practical purposes the equivalent of a showing that he controlled the particular instrumentality that caused it. Our expressions in the recent case of *Wills v. Price*, Cal.App., 79 P.2d 406, referred to by counsel go no farther than that. The distinctions to which we have just adverted appear to us entirely sufficient to reconcile the quotations by counsel from such cases as *Hilson v. Pacific Gas & Electric Co.*, 131 Cal.App. 427, 437, 21 P.2d 662; *Mintzer v. Wilson*, 21 Cal.App.2d 85, 68 P.2d 370, and *Barham v. Widing*, 210 Cal. 206, 291 P. 173; as well as the earlier case of *Ley v. Bishopp*, 88 Cal.App. 313, 263 P. 369, with what we have in the instant case said. It was, for that matter, laid down in *Hilson v. Pacific Gas & Electric Co.*, 131 Cal.App. 427 (page 434, 21 P.2d 662, 665): "that the doctrine of *res ipsa loquitur* can only apply when the defendant has exclusive control of the instrumentality causing the injury, and can in no event apply when the accident may as well have been due to one or more causes over which defendant had no control". This, the court says, "is a correct statement of the rule".

Returning to the facts in the instant case, if, the situation being *res integra*, the jury were confronted with evidence requiring no resort to very doubtful inference to enable them to conclude that vat 14 and the adjacent corridor and all explosive materials as well as all instrumentalities capable of igniting them were at the time of the explosion under the exclusive control of

respondent, then we would have no hesitation in saying that the inference *res ipsa loquitur* might be properly indulged.

[6, 7] We do not wish to be understood as holding that circumstantial evidence will never suffice to establish the control by the defendant of the instrumentality causing the accident so as to lay the foundation for the inference *res ipsa loquitur*. That would be going altogether too far and be contrary to the views expressed in such cases as *Lejeune v. General Petroleum Corporation*, 128 Cal.App. 404, 416, 18 P. 2d 429, and *Hilson v. Pacific Gas & Electric Co.*, supra, as well as to the reasoning of *Barham v. Widing*, supra, although that case did not strictly speaking, involve the doctrine *res ipsa loquitur*. When, however, as here, the establishment of such exclusive control must itself rest on inferences, which are so far from necessary ones that the contrary inferences are at least as tenable as the ones adopted, we do not think the doctrine applicable.

The petition for rehearing is denied.



27 Cal.App.2d 340

KENT v. COUNTY FIRE INS. CO. OF PHILADELPHIA.

Civ. 11727.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1938.

1. Judgment ☞363

The statute authorizing court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect should be liberally construed so as to dispose of cases on their substantive merits and give party claiming meritorious right in good faith opportunity to present it. Code Civ.Proc. § 473.

2. Appeal and error ☞982(2)

Reviewing courts will scan more closely and are more prone to reverse orders denying relief from judgments on ground of mistake, inadvertence, surprise or excusable neglect than orders granting such relief. Code Civ.Proc. § 473.

3. Appeal and error ☞982(1)

Courts look with disfavor on party attempting to take advantage of his adversary's mistake, surprise and inadvertence, regardless of merits of his case, in reviewing order denying relief from judgment so obtained. Code Civ.Proc. § 473.

4. Judgment ☞364

The trial court did not abuse its discretion in refusing to set aside judgment and stay proceedings thereon until disposition of garnishment and execution proceedings against judgment debtor by creditors of judgment creditor's assignor on ground of reasonable and justifiable mistake of law by judgment debtor's counsel in believing that proper remedy was interpleader action against execution and garnishee creditors. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by M. Kent against the County Fire Insurance Company of Philadelphia. Judgment for plaintiff, and from an order denying defendant's motion to set aside the judgment and stay proceedings thereon until disposition of garnishment and execution proceedings against defendant, the latter appeals.

Affirmed.

Hindman & Davis, by Angus C. McBain, all of Los Angeles, for appellant.

A. Brigham Rose, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order of the superior court denying defendant relief under section 473 of the Code of Civil Procedure, to-wit, that the judgment be set aside and that the proceedings on the judgment be held in abeyance until certain proceedings on garnishment and execution which were levied against the defendant by the creditors of the plaintiff's assignor be disposed of.

The facts are fully set forth in the case of *M. Kent v. County Fire Insurance Company*, Cal.App., 78 P.2d 436, to which reference is made for particulars.

[1-3] The purpose of section 473 of the Code of Civil Procedure is remedial. It should be liberally construed so as to dispose of cases upon their substantive merits and give the party claiming in good

faith to have a meritorious right, an opportunity to present it. Because of this the reviewing courts will scan more closely orders denying relief and are more prone to reverse orders of denial. They look with disfavor upon a party, who, regardless of the merits of his case, attempts to take advantage of mistake, surprise and inadvertence of his adversary. *Brill v. Fox*, 211 Cal. 739, 743, 297 P. 25.

[4] Defendant's counsel believed that the proper remedy to protect defendant from the creditors of Harry Knight, plaintiff's assignor, was through a bill of interpleader, and went ahead and deposited the full amount of the judgment with the court in an interpleader action, bringing in the execution creditors and garnishee creditors.

The basis of defendant's application for relief under section 473, Code of Civil Procedure, is that a reasonable and justifiable mistake of law was made when appellant's counsel believed that such was the proper remedy. He contends that there should be considered in this connection as justification therefor, the complete lack of other remedies under our California statutes and decisions, and particularly the isolation and inadequate digests of the authorities which hold a motion for stay of proceedings to be a proper procedure to guard against levies by a creditor of plaintiff. *McFadden v. O'Donnell*, 18 Cal. 160; *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86; *Glugermovich v. Zicovich*, 113 Cal. 64, 45 P. 174, and *Lynch v. Hartford Fire Ins. Co., C.C.*, 17 F. 627, 629. Further justifying the reasonableness of defendant's belief in the remedy of interpleader, he points out that there is no authority in California involving a factual situation similar to this matter wherein the right of interpleader was denied, and that on the other hand there is substantial authority in other jurisdictions approving the use of interpleader under the same and similar circumstances. (*Van Slyck v. Dallas Bank & Trust Co.*, Tex.Civ.App., 45 S.W.2d 641; *Johnson v. Harbison, etc.*, Min. Co., 181 Ga. 630, 183 S.E. 791; *First Nat. Ins. Co. v. Lerner*, 242 App.Div. 850, 275 N.Y. S. 224; *Steffey, Inc., v. American Bank Stationery Co.*, 161 Md. 124, 155 A. 306, and *Atwell v. Western Fire Ins. Co.*, 120 Fla. 694, 163 So. 27), and that the few California cases approaching the point are also favorable thereto (*Fox v. Sutton*, 127 Cal. 515, 59 P. 939; *Orient Ins. Co. v. Reed*, 81 Cal. 145, 22 P. 484).

It is defendant's position that the trial court's order denying relief flies in the face of these rules regarding section 473 of the Code of Civil Procedure and the true spirit of their application, and that instead of following the purpose of the statute the trial court committed an abuse of discretion which permitted the plaintiff to take advantage of defendant's reasonable and justifiable mistake and obtain an advantage which offends every legal and moral principle.

We are of the view that the trial court did not abuse its discretion in refusing to set aside the judgment. The remedy sought by the defendant was a desperate remedy. It would have been surprising had the court granted it. Petitioner cites us to no precedent for such an order either in this jurisdiction or elsewhere. Furthermore, we are not convinced that the defendant will ever have to pay any money to the execution creditors and to the garnishee creditors. The money which the defendant put up was placed up in the interpleader suit and the defendant should attempt to get its money back in that proceeding.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.



26 Cal.App.2d 642

SISCHO v. CITY OF LOS BANOS.

Civ. 5847.

District Court of Appeal, Third District,
California.

June 30, 1938.

1. Evidence ◊7

It is common knowledge that tiling when wet is slippery.

2. Municipal corporations ◊800(1)

As respects city's liability for injuries sustained by pedestrian who slipped on wet tiling leading from sidewalk line to store entrance, that pedestrian's body alighted upon sidewalk was immaterial, where proximate cause of accident was the slipping on wet and slippery tile.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 80 P.2d 116.

Cooley, Crowley & Supple, of San Francisco, Chester O. Hansen, of Fresno, Gregory P. Maushart, of Los Banos, and Stephen P. Galvin, of Merced, for appellant.

C. Ray Robinson, R. R. Sischo, Willard B. Treadwell, and James D. Garibaldi, all of Merced, for respondent.

PER CURIAM.

Counsel for respondent is in error in assuming that the court was either deceived or misled by any error in the printing of the testimony contained in the appellant's brief.

This cause was before us upon a motion to dismiss or affirm. At that time the testimony of the plaintiff was carefully read, and the conclusion reached that the motion should be denied. Upon the submission of this cause the testimony of the plaintiff was again read, and after the reading thereof was compared with that portion of the plaintiff's testimony set out in the appellant's brief, and which was copied by this court in its opinion. We did not notice that the words "Was that mark on the tile and on the sidewalk?" had been omitted in the printing of the testimony in appellant's brief. However, a reading of the testimony set out in the opinion of this court indicates that that omission was absolutely and wholly immaterial; it did not in any way tend to change the legal effect of the testimony or vary in the least the proximate cause of plaintiff's injury.

In the opinion of this court we find that we did set forth the following: "A. I looked to see what particularly caused my fall; in packing me back I looked right here where I slipped, and the mark of my foot was right on the tile, slid over in that manner, and the right foot there was a streak that went off here for a foot or so (indicating). Q. On the tile or on the pavement? A. On the pavement."

We do not deem it necessary to again set forth the testimony of the plaintiff showing beyond any question that when he placed his left foot upon the wet and slippery tiling, it shot from under him; that his right foot made a streak on the sidewalk, and that the left foot slipped on over a portion of the pavement; thus showing absolutely that the proximate cause of the plaintiff's injury was the slipping upon the wet tile.

[1] It is common knowledge that tiling, when wet, is slippery, and in this cause the testimony shows that the tiling was wet, and therefore slippery.

With the omitted words supplied, which have no significance in themselves, the testimony which we have set out in the opinion filed in this cause is not only accurate, but establishes the conclusion irresistibly, which we have reached, that no cause of action has been shown to exist as against the city of Los Banos.

[2] We may add that even though the sidewalk constructed by the city of Los Banos was perfectly flat, the streaks made thereon after the defendant had slipped on the tile would have been practically the same. The negligible slope of the sidewalk is shown by the testimony not to have precipitated the plaintiff's fall. That the plaintiff's body alighted upon the sidewalk is wholly immaterial. The city under such circumstances would no more be rendered liable than would be the case if one were jolted from a street car and alighted upon the concrete portion of a paved street. The jolting from the street car would not injure the person's body; the striking on the paved street would occasion the injury, but the proximate cause would be the jolting of the person from the street car. That is just the case presented by the record here. The proximate cause was the slipping upon the wet and slippery tile.

The verdict of the jury did not conform to the facts of the case showing the proximate cause, and an order of reversal was necessary. This being decisive of the case, other questions presented upon the petition for rehearing need not be considered.

The petition for rehearing is denied.

27 Cal.App.2d 358

NOZAWA et al. v. COLE.

Civ. 10701.

District Court of Appeal, First District,
Division 2, California.

June 29, 1938.

1. Appeal and error ⇨989

On appeal from a judgment for a motorist sued for injuries sustained by a child 7½ years old when struck by automobile, reviewing court was only concerned with whether substantial competent evidence supported findings as to negligence and contributory negligence, where such issues presented questions of fact.

2. Appeal and error ⇨1008(1)

The negligence of a motorist who struck a child 7½ years old, who suddenly ran onto highway from behind a building, and the contributory negligence of child were for the trier of facts.

3. Appeal and error ⇨1008(1)

The capacity of youth to appreciate danger from motorists on a highway is one left primarily to the trier of facts.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Kiminori Nozawa, by and through Yosaburo Nozawa, his guardian ad litem, and another against John Gordon Cole for injuries sustained when first-named plaintiff was struck by an automobile. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Jesse A. Muller and Russell C. Westover, Jr., both of San Francisco, for appellants.

Hutchinson & Green, of San Francisco (J. Albert Hutchinson, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

[1] In an action for damages for personal injuries, brought by a minor and his guardian, the cause was tried by the court without a jury. Findings of fact were made that there was no negligence on the part of the defendant, and that the proximate cause of the injuries was the contributory negligence of the minor plaintiff.

In his appeal from the judgment this plaintiff indirectly attacks these findings, though conceding that the evidence on both issues is conflicting. He states three questions as those involved in the appeal—whether the conduct of the defendant is negligence “as a matter of law”, whether the conduct of the plaintiff is contributory negligence “as a matter of law”, and whether a minor of seven and one-half years of age can be guilty of contributory negligence “as a matter of law”. Each of the three questions raises a false issue. We are not concerned with whether any of these circumstances constitute negligence “as a matter of law”. Each presents a simple question of fact which the trial court determined adversely to appellant. On this appeal our only concern can be whether there is substantial competent evidence supporting the findings.

[2,3] The respondent's evidence, supported by competent testimony, is that he was driving his automobile in a careful and prudent manner, and that the appellant suddenly ran from behind a building and into the highway directly within the path of the automobile. On the issue of contributory negligence, the respondent showed that the appellant did not stop at the curb and did not look for approaching traffic. Two other cars were close to respondent's, running in the same direction. Occupants of these cars confirmed the respondent's version of the accident in every essential detail. There was scarcely any conflict but, such as there was, related to immaterial details and was resolved in favor of respondent. This leaves nothing to be argued here upon these issues of negligence.

The question of the capacity of youth to appreciate dangers of this character is one left primarily to the trial court. No facts are asserted here to show error on the part of the court. As we have said, it is not a question whether a child of a given age is guilty of contributory negligence “as a matter of law”. It is a question of fact to be determined in the light of all the facts and circumstances of each case. No error is claimed and we find none.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

27 Cal.App.2d 377

RUBELL v. SANTA CLARA COUNTY.

Civ. 10706.

District Court of Appeal, First District.
Division 2, California.

June 30, 1938.

Rehearing Denied July 30, 1938.

Hearing Denied by Supreme Court
Aug. 29, 1938.

Highways ⇐ 192

In statutory action against county for injuries from automobile accident allegedly caused by negligent condition of highways when automobile being driven at night could not be stopped because of loose gravel and ran past end of highway at its intersection with second highway, evidence, showing that no signs were maintained to indicate termination of first highway, that first highway had gradual and slight rise to end of bridge which it crossed just before it joined second highway, and descended abruptly after crossing bridge, that many similar accidents had occurred, that highway officials were generally familiar with conditions at intersection, and that district highway supervisor knew of presence of gravel and absence of signs, authorized recovery. St.1923, p. 675.

Appeal from Superior Court, Santa Clara County; A. F. Bray, Judge.

Action by Emma J. Rubell against Santa Clara County for injuries sustained in an automobile accident allegedly caused by the dangerous condition of certain highways. From a judgment for plaintiff, defendant appeals.

Affirmed.

Fred L. Thomas, Dist. Atty., and John P. Fitzgerald, Chief Deputy Dist. Atty., both of San Jose, for appellant.

Maurice J. Rankin and C. E. Luckhardt, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained in an automobile accident alleged to have been caused by a dangerous condition of certain highways of which the board of supervisors of the defendant county had knowledge and which said board had failed and neglected to remedy within a reasonable time. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiff, defendant appeals.

The contentions of appellant are, first, that the evidence was insufficient to sus-

tain the finding that a dangerous condition existed and, second, that even assuming that the evidence was sufficient for that purpose, it was insufficient to sustain the finding that the board of supervisors had knowledge thereof. We find no merit in these contentions.

It has been said that when dealing with cases under the statute in question (Stat. 1923, p. 675), "Each case must depend upon its own state of facts, and so varying are the factors which contribute to produce a result that no hard and fast rule may find practical application in the great majority of cases." *Rafferty v. City of Marysville*, 207 Cal. 657, 661, 280 P. 118, 120; *Waldorf v. City of Alhambra*, 6 Cal.App. 2d 522, 526, 45 P.2d 207.

It is difficult to describe briefly and accurately the unusual condition of the highway which is shown by the evidence in this case. This condition was made clear to the trial judge not only by oral testimony together with numerous photographs and diagrams, but the trial judge also had the benefit of a visit to the scene of the accident to view the condition which existed.

The accident occurred on a dark night at the westerly end of Hillsdale avenue where said avenue terminates at Almaden road just after crossing the bridge over Guadalupe creek. Both roads are two lane highways. The bridge is about 83 feet long and appears to be a concrete structure with low concrete walls at either side thereof. Hillsdale avenue is a straight, level road for approximately one mile east of the bridge. On the immediate approach to the bridge from the east the road has a gradual and very slight rise continuing to the west side of the bridge. From there the road descends rather abruptly, dropping 30½ inches in 48 feet to the easterly edge of the pavement of Almaden road. It then drops 6 inches to the westerly edge of Almaden road where there is an abrupt drop of approximately 29 inches to the level of the orchard which is at the west of the intersection. No signs of any kind or character were maintained on either Hillsdale avenue or Almaden road giving notice of the termination of Hillsdale avenue or of the intersection thereof with Almaden road. On the descent from the bridge to Almaden road, there was a layer of loose gravel on the macadam surface which affected the traction of automobile tires and interfered with retarding the progress of an automobile by the application of brakes.

On the night in question respondent was riding as a passenger in an automobile which was being driven in a westerly direction along Hillsdale avenue. Neither respondent nor the driver was familiar with the road or with the condition existing at its intersection with Almaden road. The driver was operating the automobile at a speed between 40 and 45 miles per hour. When the car had passed the center of the bridge, the driver first discovered that Hillsdale avenue terminated at an intersection with another road. He immediately applied his brakes but because of the grade of the road and the loose gravel on the macadam surface, he was unable to stop the car before it ran off the end of the road and overturned in the orchard.

Various witnesses testified that many accidents had occurred by persons running off the end of Hillsdale avenue into said orchard. While there was no direct evidence to show that the members of the board had actual knowledge of these accidents, it appeared that they were generally familiar with the conditions at this intersection and that the supervisor from that district was fully acquainted with the conditions which the trial court found to be dangerous. It appeared that he had traversed said intersection at least once a month over a period of many years; that he knew of the grade of the road near the end of Hillsdale avenue and the presence of gravel on the macadam surface; that he knew that the directional sign, which had previously stood at the intersection on the westerly side of Almaden road, had been knocked down or destroyed some two years prior to the accident and had not been replaced; that he knew that no signs, warnings or barriers of any kind were maintained near the termination of Hillsdale avenue, although he had caused a barricade or warning sign to be erected at the intersection of Pearl avenue and Hillsdale avenue, which was only a short distance from the intersection in question.

In view of the evidence as briefly summarized above and also in view of the fact that the trial judge visited the scene and learned the actual condition of the grades and of the surface of the roads together with the appearance of the scene as the driver approached the intersection, it cannot be said as a matter of law that the evidence was insufficient to sustain the chal-

lenged findings. *Bennett v. Kings County*, 124 Cal.App. 147, 12 P.2d 47.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



27 Cal.App.2d 225

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 10777.

District Court of Appeal, First District,
Division 2, California.

June 22, 1938.

1. Workmen's compensation ⇨1070

In compensation proceeding, under compensation liability policy issued to "J. C. McMahon and Charles Thomas, jointly and not severally, a copartnership," evidence showing that no partnership existed, and that claimant was employed by only one of the alleged partners, and failing to show that insurer intended to insure such alleged partners as individual employers, did not support action of the Industrial Accident Commission in reforming policy to make it cover alleged partners as individual employers, and in rendering award against insurer. Civ.Code, § 3399.

2. Reformation of instruments ⇨19(1)

A showing of a common intent is essential where it is sought to reform a contract on the ground of mutual mistake. Civ.Code, § 3399.

Proceeding under the Workmen's Compensation Act by Richard F. Lee, claimant, opposed by Charles Thomas and another, employers, and by National Automobile Insurance Company, insurer. To review an award of the Industrial Accident Commission for claimant, the insurer brings certiorari.

Award annulled.

S. Norman Hays, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Accident Commission.

SPENCE, Justice.

Petitioner seeks the annulment of an award made by the respondent commission in favor of Richard F. Lee and against the petitioner.

The question of the propriety of the commission's action in reforming the policy of insurance issued by petitioner is the sole question presented. There is no material conflict in the evidence.

J. C. McMahon was the lessee of certain premises in El Cerrito upon which was operated a "night club" known as the Wagon Wheel. He operated the "club room" in the back portion of the building and he subleased to Charles Thomas the entire front portion, consisting of the bar and the dining room. The policy of insurance was issued to "J. C. McMahon and Charles Thomas, jointly and not severally, a copartnership, doing business as Wagon Wheel." The undisputed evidence shows that no partnership existed at any time and that Lee, the injured employee, was in the employ of Thomas. The commission made its order that the policy "be reformed to express the true intent of the parties and to cover J. C. McMahon and Charles Thomas as individuals".

Petitioner contends that the commission acted without and in excess of its powers as there was no evidence to sustain its order reforming said policy. Upon the record before us, we are of the opinion that this contention must be sustained.

It is conceded that the commission has jurisdiction to reform a policy of insurance upon a proper showing. *Bankers' Indem. Ins. Co. v. Industrial Acc. Comm.*, 4 Cal. 2d 89, 47 P.2d 719. It is further conceded that in certain cases the courts of this state have declared against the "entity theory" with respect to partnerships. *Reed v. Industrial Acc. Comm.*, Cal.Sup., 73 P.2d 1212, 114 A.L.R. 720; *First Nat. T. & S. Bank v. Industrial Acc. Comm.*, 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324; *Zimmerman v. Industrial Acc. Comm.*, 119 Cal.App. 253, 6 P.2d 291. But we do not believe that the cited cases are controlling here.

No authority has been called to our attention dealing with a policy which insured two or more persons "jointly and not severally" as a copartnership. Such was the provision of the policy here. It appears prob-

able that this policy was drafted in the light of the language of the opinion in *First Nat. T. & S. Bank v. Industrial Acc. Comm.*, supra, where the court said at page 332, 2 P.2d at page 351, "Had this insurance company desired to insure only this copartnership as an entity, it could have been easily so designated in naming the employer." It is entirely clear that the policy under consideration purported to insure only against the liability of a copartnership as employer and that it did not insure against the liability of either of the named individuals as employer. Such being the case, there could be no justification for the award of the commission in favor of Lee, an employee of Thomas, under the policy as written and the award cannot be upheld unless there was evidence making out a proper case for reformation of the policy.

[1,2] The record before us is utterly devoid of any evidence warranting reformation. Under section 3399 of the Civil Code, reformation can be had only "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties * * *." It is apparently conceded that the reformation was ordered upon the theory that through "mutual mistake", the policy as written did not "truly express the intention of the parties". But there is not a particle of evidence showing the intention of petitioner, or of any agent or employee of petitioner, other than the intention shown by the wording of the policy itself. The intention of petitioner, as clearly manifested by the policy, was an intention to insure only against the liability of a copartnership as employer and not against the liability of either of the named individuals as employer. As there never was any partnership in existence, it was undoubtedly the intention of McMahon and Thomas to obtain insurance which would insure against their liability as individual employers. But in the absence of any evidence of petitioner's intention, other than that shown by the policy, the only conclusion which can be reached is that the minds of the parties never met. There could not therefore be a reformation to "truly express the intention of the parties", for there was no evidence to show a common intent. A showing of a common intent is essential where it is sought to reform a contract on the ground of mutual mistake. *Meyerstein v. Burke*, 193 Cal. 105, 222 P. 810; *Ward v. Yorba*, 123 Cal.

447, 56 P. 58; *Bank of Fruitvale v. Fidelity, etc., Co.*, 35 Cal.App. 666, 170 P. 852; 53 Cor.Jur. 945, par. 60; *Cooley's Briefs on Insurance*, 2d ed., p. 1429.

The award is annulled.

We concur: NOURSE, P. J.; STURTEVANT, J.



NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. *

Civ. 10774.

District Court of Appeal, First District,
Division 2, California.

June 22, 1938.

Rehearing Granted July 22, 1938.

Insurance ☞435

In compensation proceeding, under compensation liability policy issued to "Oscar Mester and H. E. Schmidt, jointly and not severally, a copartnership," evidence showing that claimant was originally employed by partnership, but left its employment, and was subsequently employed, before his injury, by individual who had formerly been a partner and had obtained transfer of interest of the other partner on dissolution of partnership, did not authorize award against insurer, notwithstanding statute providing that transfer of interest from one insured partner to another shall not avoid insurance, even though it has been agreed that insurance shall cease on alienation of subject insured. St.1935, p. 504, § 304.

Proceeding under the Workmen's Compensation Act by Eddie S. Higdon, claimant, opposed by H. E. Schmidt, also known as Whitie Smith, and another, employers, and by National Automobile Insurance Company, insurer. To review an award of the Industrial Accident Commission for claimant, the insurer brings certiorari.

Award annulled.

S. Norman Hays, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Accident Commission.

SPENCE, Justice.

Petitioner seeks the annulment of an award made by the respondent commission in favor of Eddie S. Higdon and against the petitioner.

Higdon was originally employed as a "floor manager and bouncer" by H. E. Schmidt and Oscar Mester, as copartners doing business under the name of Bal Masque Ballroom in San Francisco. He left their employ but returned late and was re-employed by Schmidt after the dissolution of the copartnership. The business was then being conducted by Schmidt individually. Thereafter, and while working for Schmidt, Higdon's hand was injured when it came in contact with the face of one of the customers.

During the existence of the copartnership, petitioner issued its policy of insurance to "Oscar Mester and H. E. Schmidt, jointly and not severally, a copartnership d.b.a. Bal Masque Ballroom." The commission found that "Eddie S. Higdon, applicant, while employed as a floor manager and bouncer on December 31, 1936, at San Francisco, by H. E. Schmidt, also known as Whitie Smith, and Oscar Mester, doing business under the firm name and style of Bal Masque Ballroom, sustained injury. * * *" In denying a petition for rehearing, the commission stated in its order, "This commission is of the opinion that a transfer of partnership interests by defendant Mester to defendant Schmidt (alias Smith) prior to injury would not void a valid and existing compensation insurance policy issued to them jointly, as partners, and that the finding that the applicant was at the time of his injury in the employ of Schmidt and Mester, doing business under the firm name and style of Bal Masque Ballroom, if erroneous, is nevertheless not one which prejudices or gives cause for grievance to defendant carrier."

Petitioner contends that the commission acted without and in excess of its powers as there was no evidence to sustain the finding to the effect that the copartnership was the employer at the time the injury was sustained by Higdon. It further contends that its policy did not cover the liability of Schmidt as an individual employer. We are of the opinion that petitioner's contentions must be sustained.

A similar policy was under discussion in *National Automobile Insurance Co. v. Industrial Acc. Comm.*, Cal.App., 80 P.2d 1024, the opinion in which last-mentioned

*For subsequent opinion see 84 P.2d 201.

cause has been this day filed. The facts in the two cases differ, but some of the discussion in the above-mentioned opinion is pertinent here. It is not claimed here that the policy, as written, did not express the true intention of all parties and consequently the commission made no order for reformation. As written, the policy insured against the liability of the then existing copartnership as employer and clearly provided that it did not insure against the liability of either of the named individuals as employer. We therefore conclude that as Higdon was admittedly the employee of Schmidt alone when the injury was sustained, there is no justification in the record for the award against petitioner.

The respondent commission cites and relies upon the authorities cited in the other opinion and particularly the case of *First Nat. Bank v. Industrial Acc. Comm.*, 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324. We find none of these cases in point as none involved a policy similar to the one before us. In the last-named case the facts, other than the provisions of the policy, are quite similar. It was there said (page 351): "It will be noted that the policy, in naming the employer, names two individuals who are not even described as a copartnership. It does not specify that the partnership, as an entity, is named as the employer." But here the partnership was named as the employer and it was specifically provided that the partners were covered "jointly and not severally". The cases are therefore distinguishable on their facts. The policy here appears to be precisely the type of policy which the court had in mind when it said, "Had this insurance company desired to insure only this copartnership as an entity, it could have been easily so designated in naming the employer."

The respondent commission also relies upon section 304 of the Insurance Code, St.1935, p. 504. Said section provides: "In the case of partners, joint owners, or owners in common, who are jointly insured, a transfer of interest by one to another thereof does not avoid insurance, even though it has been agreed that the insurance shall cease upon an alienation of the subject insured." We are of the opinion that said section is not applicable here. The contract of the parties expressly provided that the policy should not cover the liability of either of the named individuals as an employer at any time and said section did not have the effect of enlarging the terms of the policy upon the dissolution of the copartner-

ship. The situation is not comparable to that presented in *First Nat. Bank v. Industrial Acc. Comm.*, supra, where the policy merely named "Charles Hascall and S. W. Powell, d.b.a. Hascall & Powell" as the employer.

The award is annulled.

We concur: NOURSE, P. J.; STURTEVANT, J.



27 Cal.App.2d 367

Ex parte WILLING.

Cr. 1638.

District Court of Appeal, Third District,
California.

June 29, 1938.

Food 3

The statute eliminating retail stores and manufacturers of milk products from provision requiring every collector-distributor of fluid milk or fluid cream to obtain a license and file a bond in amount proportionate to extent of business conducted is not unconstitutional as discriminatory, but there is a reasonable basis for classification, where collector-distributor procures from producer at his dairy barn milk already placed in cans, conveys it to a plant to be pasteurized or processed and to have butter fat content ascertained, and subsequently delivers it to his customers as fit for human consumption. St.1937, pp. 44, 50, 54, §§ 735.3(f, g), 737.5, 737.12.

Proceedings in the matter of the application of William Willing for a writ of habeas corpus.

Petition denied, proceedings dismissed, and petitioner remanded.

A. B. Reynolds and Erling S. Norby, both of Marysville, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Jos. L. Heenan, Dist. Atty., of Marysville, for respondents.

Mr Justice PLUMMER delivered the opinion of the court.

It is hereby ordered that the opinion and orders of this court, filed June 23, 1938, in the matter of this cause, be vacated, annulled and set aside, and the following opinion and orders adopted in lieu thereof:

The petitioner herein was arrested for failure to comply with section 737.5 of the Agricultural Code of the state of California, St. 1933, p. 60, added by 1935, p. 928, amended by St. 1937, p. 50, in that he engaged as a purchaser and distributor of fluid milk, etc., without first having obtained a license therefor, and giving a bond provided for in the section just referred to.

The petition raises the question of the constitutionality of section 737.5 of the Agricultural Code, and bases the objection of the constitutionality of said section on the grounds that section 737.12 of the same code renders the licensing and bonding provisions relative to distributors, discriminatory.

Section 737.5, *supra*, requires every distributor of fluid milk or fluid cream to obtain a license and file a bond in an amount proportionate to the extent of the business conducted by the distributor. Section 735.3 (f) defines a distributor as follows: " 'Distributor' means any person, whether or not such person is a producer or an association of producers, engaged in the business of distributing milk or handling fluid milk or fluid cream for resale, including persons (a) who pasteurize, bottle or process fluid milk or fluid cream, (b) who distribute fluid milk or fluid cream at wholesale, retail, or otherwise (1) to hotels, restaurants, stores or other establishments for consumption on the premises, (2) to stores and establishments for resale, or (3) to consumers."

Section 737.12, *supra*, eliminates the provisions of section 737.5 from retail stores.

Section 735.3(g) defines retail stores as retail grocery stores, restaurants, confectioners, or other similar businesses where fluid milk or fluid cream is sold to the general public for consumption off the premises. The act provides for the giving of surety bonds only, which is admitted to be valid if applicable to all persons engaged in the same business.

It is likewise conceded by the petitioner that if the act in question is not discriminatory, or if it were to apply to all persons dealing in fluid milk, it would be constitutional.

The basis of the contention of the petitioner rests upon that portion of the act which eliminates grocery stores, etc., from

the provisions thereof, and also upon the further contention that manufacturers of milk products are not included within the provisions of article 3 of the Agricultural Code. The claim is made that there is no reasonable distinction between the business carried on by a distributor, a manufacturer or a proprietor of grocery stores, etc., and the distributors of fluid milk and fluid cream to consumers.

While the arguments contained in the briefs have taken a somewhat wider course, there is really but one question involved: Is there a reasonable basis for the enactment of a provision which relates to distributors (which we will hereafter, for a little more clarity, call "collector-distributors"), and manufacturers of milk products and grocery-store keepers or others engaged in a similar line of business, so far as the sale of fluid milk or fluid cream is involved? If there is a clear line of demarkation between the manner of conducting business by collector-distributors and manufacturers of milk products, and the exempted persons or businesses referred to in the act, then it is clearly constitutional.

It is admitted that the police powers of the state authorize the legislature to legislate on the subject of the production, processing and distribution of fluid milk and fluid cream, in order that a pure product may be furnished to the consumer, and that the producer may be safeguarded against irresponsible persons who engage in business as collector-distributor. An analysis of the business carried on by collector-distributors, and the manner of conducting business by grocery stores, etc., furnishes a clear exposition of a basis warranting separate classification. The collector-distributor goes to the producer at his dairy barn and obtains so many gallons of milk from the producer, already placed in cans by the producer, conveys the same to a plant where that milk is pasteurized or processed and made fit for human consumption, and the butterfat content contained therein ascertained and determined. The collector-distributor pays nothing to the producer at the time of the collection of the cans containing so many gallons of milk, but after the gallons of milk contained in the cans are pasteurized or processed, and the butterfat contained therein ascertained, a report is made by the collector-distributor to the producer, stating the same, and then, by mathematical calculation, the value of the gallons of milk delivered by the producer to the collector-distributor is made certain, and

the amount of the indebtedness of one to the other established. The collector-distributor then takes the milk and distributes it among his customers, so many bottles or cases to one establishment and so many to another, and likewise distributes to consumers, morning after morning, so many bottles of milk fit for human consumption.

"Distributing" means parceling out, and as applied to the business conducted by the collector-distributor, we think has a clear and definite meaning, and that the legislature intended that the word "distributor" should apply to and mean a person who carries on business just as we have herein stated. The grocers and others referred to in section 737.12, *supra*, conduct business in an entirely different manner. They have nothing to do with the manufacture or pasteurizing of fluid milk or fluid cream, or rendering the same fit for human consumption; nor do they engage in the distribution of fluid milk or fluid cream in the ordinary sense of the word, or in the sense in which the legislature used that term. A grocer simply buys fluid milk or fluid cream already pasteurized and processed, by the case, or so many bottles, at a fixed price known both to the seller and to the buyer at the very time of the transaction. The grocer is no more a distributor of fluid milk or fluid cream than he is a distributor of sugar, coffee, or other products dealt in in that line of business. A patron comes to the store, calls for a bottle of milk or a bottle of cream, and the product is passed over the counter just the same as passing over the counter so many pounds of sugar, at a definite and stated price.

Again, the manufacturer of milk products cannot be brought within the terms of a distributor of fluid milk or fluid cream, by any reasonable construction of those terms. The manufacturer of milk products such as butter, cheese or ice cream, is no more engaged in the same line of business as a collector-distributor of fluid milk and fluid cream, than a manufacturer of woolen cloth is engaged in the same line of business as the jobber who buys wool from the producer and sells it to factors or manufacturers. The reasons for the classification appeal simply to the legislative body and not to the courts. Yet there are apparent reasons for the classification if we refer only to the protection of the producer of fluid milk and fluid cream, when the collector-distributor has completed a transaction, the fluid milk and the fluid cream of the producer is immediately placed beyond any legal process that

might be sought by the producer. Where milk products and cream products are manufactured, such is not the case. When the product is completed by the manufacturer, the product is there subject to any legal process that might be obtained by the producer in the event that he had not been paid for his product or in the event that payment had become insecure.

Again, in so far as the collector-distributor of fluid milk and fluid cream is concerned, it is apparent that different rules and regulations should be applied in order that the product delivered to the consumer should be as nearly one hundred per cent fit for human consumption as is possible. This is rendered necessary by reason of the fact that inspection and supervision of the handling of the fluid milk and fluid cream by the collector-distributor, in point of time is much more limited and circumscribed than the handling of the same product by the manufacturer. These are questions which we think the legislature was justified in taking into consideration in determining that the collector-distributors of fluid milk and fluid cream may properly be placed in a class by themselves. Referring again to our illustration, the manufacturer of woolen goods uses the same raw product as the jobber who buys wool for future disposition, but the process is entirely different and the resulting product is entirely different. The same is true as between the collector-distributor of fluid milk and fluid cream and the manufacturer of by-products therefrom.

The foregoing shows that there is a definite line of demarkation between the business carried on by a collector-distributor, a manufacturer of by-products, and the business engaged in by anyone of the persons or establishments mentioned in section 737.12, *supra*. A large portion of the business carried on between the producer and the collector-distributor is founded upon the faith of the producer in the collector-distributor. This faith is ordinarily called credit, but it is really faith on the part of the producer that the collector-distributor will honestly ascertain the butterfat content of the product sold and delivered by the producer to the collector-distributor, and honestly thereafter make report of the same, and final full payment. Nothing of that kind appears in the transaction between a manufacturer and producer, because the product still remains in evidence after the transaction has been completed. Nor does any thing of the kind appear in the transaction between anyone of

the exempted persons and the customer who comes in and buys a bottle of fluid milk or fluid cream that has passed over the counter, and takes it home for final consumption. It being admitted in the briefs that if there is a reasonable basis for the classification made in the act, and made only to apply to collector-distributors and not to the other persons or businesses mentioned herein, the constitutionality of the act should be upheld, further discussion seems unnecessary.

In view of what we have stated it is clear to us that such a reasonable basis exists, and that there is a clear line of demarkation between the kind of business carried on by the collector-distributor and manufacturers and exempted persons named in section 737.12, *supra*.

The petition is denied; the proceedings dismissed; and the petitioner remanded.

We concur: PULLEN, P. J.; THOMPSON, J.



27 Cal.App.2d 396

PEOPLE v. BULLINGTON.

Cr. 3107.

District Court of Appeal, Second District,
Division 2, California.

July 1, 1938.

Hearing Denied by Supreme Court
July 28, 1938.

1. Dead bodies ☞8

In prosecution for feloniously mutilating a dead body by removing two gold crowns from teeth, evidence was insufficient to justify finding that defendant removed crowns. Pen.Code, § 290.

2. Dead bodies ☞8

The removal of two gold crowns from the teeth of a dead body was not a "mutilation" of the body within statute making it a felony to mutilate a dead body, since the term "mutilate" as applied to a person means to cut off a limb or an essential part of the body, and in criminal law means to deprive a man of the use of those limbs which may be useful to him in fight. Pen. Code, § 7, subd. 16; § 290.

[Ed. Note.—For other definitions of "Mutilate; Mutilation," see Words & Phrases.]

3. Dead bodies ☞8

In prosecution for feloniously mutilating a dead body by removing two gold crowns from teeth, an instruction that word "mutilate," as used in statute making it a felony to mutilate a dead body, means to destroy or remove a material part of, so as to render imperfect, erroneously defined word as applied to articles such as books and manuscripts, rather than defining it as applied to the human body as meaning to cut off a limb or an essential part of the body. Pen. Code, § 7, subd. 16; § 290.

4. Criminal law ☞1134(4)

The reversal of a conviction for feloniously mutilating a dead body made questions raised on appeal from order denying a new trial moot, and appeal from that order was dismissed.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Edgar S. Bullington was convicted of feloniously mutilating a dead body, and he appeals from the judgment and from an order denying a new trial.

Judgment reversed and bail exonerated, and appeal from order dismissed.

George Perkins and Henry W. Bullington, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen. and Buron Fitts, Dist. Atty., Jere J. Sullivan and Arthur L. Veitch, Deputy Dist. Attys., all of Los Angeles, for the People.

WOOD, Justice.

An information was filed against defendant charging him with the crime of violation of section 290 of the Penal Code in that he did "feloniously mutilate the dead body of Michael Conway, a human being". At a jury trial he was found guilty and sentenced to the state penitentiary.

For about ten years defendant was employed as an embalmer at the morgue maintained by the county of Los Angeles. The work at the morgue is divided into three shifts, the first shift beginning at 9 a. m. and ending at 5 p. m., the second shift beginning at 5 p. m. and ending at 1 a. m. and the third shift beginning at 1 a. m. and ending at 9 a. m. On the day shift beginning at 9 a. m. the chief embalmer and a number of attendants are employed. On each of the other two

shifts an embalmer and two mortuary attendants are employed. On January 10 and 11, 1938, defendant was the embalmer working on the shift from 5 p. m. to 1 a. m.

[1] The body of the deceased was brought into the morgue at 6:45 a. m. January 10, and at 8 a. m. the embalmer then on duty, one Monroe, started to embalm it. At 9 a. m. Monroe went off duty and the chief embalmer, McCue, continued with the work of embalming until it was finished at about 10 a. m. The body was embalmed with a hard fluid. A number of witnesses testified that they saw two gold crowns on the teeth of the deceased. During the preparation for the embalming the lips of the deceased were sewed together and when the embalming was finished the body was placed on a truck opposite one of the crypts. Mr. McCue testified that ten minutes before he went off duty at 5 p. m. he inspected the body and observed that the lips were still sewed together with string and that there was vaseline on the lips to stick them together. He lifted the corner of the lips and saw that the gold crowns were still in place. During the next shift the two mortuary attendants occasionally made trips away from the morgue to bring in other bodies and during these periods defendant was alone at the morgue. Mr. Monroe returned to work at 1 a. m. on January 11 and relieved defendant. He testified that he looked at the body of the deceased and observed that the gold crowns were missing. He then took the two attendants who worked with him on this shift to observe the condition of the mouth and the absence of the crowns. When Mr. McCue returned to work at 8 a. m. on January 11, he and Mr. Monroe looked at the body and observed that the lips were still sewed together but that the vaseline was not upon the lips. The mortuary attendants on all of the shifts were called as witnesses and each denied that he had removed the crowns.

At 10:30 a. m. on the morning of January 11, detectives Ledbetter and Hurst met defendant at 1045 Overton street and informed defendant he must accompany them to the coroner's office. Defendant drove his own car and the officers followed in a different car. Defendant parked his car at the corner of Temple and Grand avenues, about three blocks from the morgue. At that time the officers searched defendant's automobile and under the driver's wheel found a small manila envelope torn in half.

This envelope was delivered to Mr. Pinker, chemist on the Los Angeles police force. In the vest pocket of defendant the officers found another and similar manila envelope containing a small piece of gold which defendant stated had been used as a filling in one of his own teeth. Defendant's statement was later verified by the dentist who had done the work on defendant's tooth. Defendant told the officers that his cigaret package had become wet and that he had used the torn envelope found in the car in which to carry four or five cigarets. Evidence of gold in the torn envelope could not be detected by the naked eye. Mr. Pinker testified that from his microscopic examination he determined that "the interior of the envelope was contaminated with microscopic portions of a metal having a gold appearance in color. From spectrograph examination of those I determined that it was an alloy of gold and silver containing the element boron". He further testified that in dental work an alloy of silver and gold is customarily employed; "that boron can enter the metal in the form of a flux, or from the molding that is used in molding the filling or the crown". The witness further testified that jewelers use an alloy composed of gold and silver and that the gold specks found in the envelope could have come from jewelry; that jewelers use boron for a flux. The envelopes found in defendant's pocket and on the floor of his car were of the kind customarily used in the county morgue for the purpose of preserving small pieces of jewelry and cash found on the body of deceased persons.

Two funeral directors, who had had many years of experience in embalming dead bodies, testified that if a body had been embalmed with a hard embalming fluid it would be very difficult to open the jaws seven hours after the embalming; that the jaws would be set in about two hours. That it is customary to sew the mouth before embalming. That after embalming the flesh becomes rigid and hard; that the flesh can be stretched but that it is almost impossible to get it back to its original position. That after seven hours from the time of embalming any movement of the jaw or lips could not be repaired but would be discernible; that the teeth could not be taken out after embalming without breaking the strings.

Defendant now contends that the acts he is accused of having committed do not constitute a violation of section 290 of the

Penal Code; and that the evidence is insufficient to justify the finding of the jury that he removed the gold crowns. Both of these contentions must be sustained.

[2,3] The trial court refused to instruct the jury at the request of the defendant that the removal of the gold caps without the removal of the natural teeth of the deceased did not constitute a mutilation of the dead body but the court did instruct the jury as follows: "A removal of a crown cemented upon a tooth of the body of a dead human being constitutes a mutilation of such body. If such act be done willfully and unlawfully, it constitutes a violation of Section 290 of the Penal Code of the State of California." It will be noted that the court took from the jury the consideration of the question as to what constituted a mutilation but positively held as a matter of law that the removal of two crowns which had been cemented to the natural teeth of the body constituted a mutilation within the meaning of the Code provision. Section 290 of the Penal Code is as follows: "Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment." The legal dictionaries are in accord as to the meaning of the word "mutilate". In Bouvier's Law Dictionary, Rawle's Third Rev., we find: "The depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amount to mayhem." In 5 Words and Phrases, First Series, page 4645, we find: "The term 'mutilate,' as applied to a person, means to 'cut off a limb or an essential part of the body,' and in criminal law means 'to deprive a man of the use of those limbs which may be useful to him in fight'." In State v. Cody, 18 Or. 506, 23 P. 891, 896, 24 P. 895, it is stated: "And to 'mutilate' is to cut off a limb or essential part of the body; and the latter term, in criminal law, is, according to Bouvier, to deprive a man of the use of any of those limbs which may be useful to him in fight." Turning to the general dictionaries we find in the Standard Dictionary this definition: "To deprive of a limb or essential part; maim; disfigure." And in Webster's Dictionary we find: "To cut off or remove a limb or essential part of; to maim." In the Oxford Dictionary, volume 6, page 799, we find this definition:

"To deprive (a person or animal) of a limb or some principal organ of the body; to cut off or otherwise destroy the use of (a limb or organ)." In each of these three dictionaries a second definition is given but in each case the second definition refers to the mutilation of some article such as a book or manuscript. As, for example, the second definition in the Oxford Dictionary is as follows: "To render (a thing, esp. a record, book, etc.) imperfect by cutting off or destroying a part."

The trial court instructed the jury as follows: "The word 'mutilate' as used in Section 290 of the Penal Code, means to destroy or remove a material part of, so as to render imperfect." The trial court erroneously used the definition of the word as applied to articles such as books and manuscripts rather than the definition which is given in all of the recognized dictionaries as applied to the human body. It is provided in Penal Code section 7, subdivision 16, that: "Words and phrases must be construed according to the context and the approved usage of the language." In none of the dictionaries, either legal or general in scope, do we find a definition of the word "mutilate" as applied to the human body which is couched in the language used by the trial court or in any similar language. Without the use of the dictionaries it would be difficult to conclude that one who removes gold crowns from the teeth of a dead body could be properly accused of mutilating the body. The evidence in the case before us shows that the natural teeth were not removed or impaired and that the only act committed was the mere removal of the crowns which had been cemented to the teeth. There was no maiming or disfigurement of the teeth or of any part of the body. It could not be successfully argued that a plate of false teeth, which is frequently removed for long periods of time, is in fact a part of the body. If two teeth should be removed from the jaw of a living person and two crowns should be fashioned by the dentist in such manner that they could be used and readily removed it could not be seriously argued that the two false teeth would become a part of the body. The argument that the placing of cement on the false teeth to make them adhere to the natural teeth would result in the false teeth becoming a part of the human body seems equally unsound. An examination of all the evidence leads to the inevitable conclusion that the crime

charged in the information has not been proved.

[4] The judgment is reversed and the bail of appellant is exonerated. Our reversal of the judgment makes the questions raised on the appeal from the order denying a new trial moot. The appeal from said order is dismissed.

We concur: CRAIL, P. J.; McCOMB, J.



27 Cal.App.2d 327

In re BRISACHER'S ESTATE.

EDWARDS v. BRISACHER et al.

Civ. 11869.

District Court of Appeal, Second District,
Division 2, California.

June 27, 1938.

Rehearing Denied July 18, 1938.

Hearing Denied by Supreme Court
August 25, 1938.

1. Wills ⇐665

Executors opposing petition of daughter, to whom testatrix bequeathed all jewelry not specifically mentioned in will, for partial distribution of one single diamond ring, on ground that such ring was the "diamond wedding ring" bequeathed to one of the executors, merely attempted to identify which ring was the "diamond wedding ring" and did not contest any of the provisions of the will or any distribution thereunder so as to forfeit all their interest in estate except \$10, as provided in contest clause in will.

2. Wills ⇐490

Where testatrix, who bequeathed a "diamond wedding ring" to her son and all her jewelry not specifically mentioned in will to her daughter, left a ring which the son contended was the diamond wedding ring and another ring which daughter contended was the diamond wedding ring, testatrix' declarations in which she referred to a single diamond ring as her wedding ring were admissible to identify the ring referred to in will as her diamond wedding ring. Probate Code, § 105.

Proceeding in the matter of the estate of Rebecca Brisacher, deceased, wherein May Brisacher Edwards filed a petition for partial distribution of the estate, and wherein Harry Brisacher and Leo Brisacher filed a petition for partial distribution of the estate. From an order of partial distribution, May Brisacher Edwards appeals.

Order affirmed.

Harry A. Chamberlin and Bradner & Weil, all of Los Angeles, for appellant.

Dana R. Weller, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from an order of partial distribution. The controversy arises out of a dispute as to whether the distributees (respondents) are entitled to the portion distributed to them under certain clauses of the decedent's will, or whether they have by reason of certain facts herein after set forth forfeited all their interest in the estate except the sum of ten dollars each under another clause of the will.

The decedent distributed her property by will. In the eighth clause of the will she gave a "diamond wedding ring" to Harry Brisacher, and later in the same article she provided that "any jewelry not specifically mentioned or bequeathed herein shall go absolutely to my daughter, May". Thereafter she distributed the balance of her estate in four equal parts to her children, and still later she provided a contest clause to the effect that if any of her children "in anywise, directly or indirectly, contest or aid in contesting the same, or any of the provisions thereof or the distribution of my estate thereunder, then, and in that event, I annul any bequest made herein" and limit said child to ten dollars. Thereafter, May petitioned the court for partial distribution of one single diamond ring appraised at one hundred dollars. On the day set for the hearing of this petition, Harry Brisacher and Leo Brisacher, purporting to act as executors, filed what they entitled "Executors Objections to Petition for Partial Distribution" in which they alleged "That petitioner is not entitled to distribution of an item of jewelry specifically described as one single diamond ring herein appraised at \$100.00, but that the same is specifically bequeathed to Harry Brisacher." On the same day a hearing was had on the petition before Honorable J. W. Mullin, Jr., judge pro tempore. In behalf of their objection respondents produced

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

witnesses and offered to prove that the testatrix had referred many times to the single diamond ring as her wedding ring. An objection to such evidence was made and sustained. While the above proceedings were pending the respondents herein filed a petition for partial distribution including "a diamond wedding ring appraised at \$100.00". To this petition for partial distribution appellant filed an answer denying that said ring was the ring referred to in the will, and alleging that the phrase in the will "a diamond wedding ring" referred to the ring appraised at \$15. She further alleged that the acts and conduct of the respondents in contesting her petition constituted a contest of a provision of the will and a contest of a distribution under the will, and therefore that the respondents were entitled to only a distribution of ten dollars. At the hearing the appellant offered and proved the facts above stated. The respondents on their part offered evidence and were permitted to testify over objection of appellant that the testatrix on many occasions both prior to and subsequent to the time she acquired the diamond wedding ring, referred to the "single diamond ring" as her "wedding ring", and that their objections to appellant's petition for partial distribution were filed in good faith and in the belief that the single diamond ring was the diamond wedding ring specifically bequeathed to Harry Brisacher.

The trial court found that the respondents had filed their objections to appellant's petition in good faith and in the belief that the single diamond ring was the one referred to and mentioned in the will as a "diamond wedding ring" bequeathed to Harry Brisacher, and held that they had not directly or indirectly contested a distribution of the estate under the will, and that they had not forfeited their interest in the estate as provided in the will, and ordered partial distribution to them. As to the diamond wedding ring which they described in their petition as appraised at \$100, the court denied their petition without prejudice for the reason that a petition for distribution of the same property to May Brisacher Edwards was then pending in another department. The appeal is from this order of partial distribution entered on February 23, 1936.

[1] The appellant says: "The sole question is whether the respondents under the foregoing facts thereby violated the fourteenth article of the will and forfeited all

their interest in the estate except \$10.00?" In our view the facts do not constitute a contest of the will or any portion thereof. The respondents were merely attempting to identify which ring was the "marriage ring" designated in the will as going to Harry Brisacher. The question of their right to file objections as executors was not raised in the trial court. The executors did not contest any of the provisions of the will or any distribution thereunder, but merely contended that the petitioner claimed something to which she was not entitled. In re Estate of Kline, 138 Cal. App. 514, 521, 32 P.2d 677, 681. That case quotes from Tate v. Camp, 147 Tenn. 137, 245 S.W. 839, 26 A.L.R. 755, as follows: "If the action of a legatee is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning." See, also, In re Estate of Harrison, 22 Cal.App.2d 28, 70 P.2d 522.

The issue as to the distribution of the rings has not yet been decided by the trial court. It may well be that the issue as to the identity of the rings will resolve in favor of the respondents, in which event, if appellant's contention should be upheld, respondents would be penalized for maintaining the will against her unjust demands.

[2] Finally, appellant contends that the parol testimony as to the declarations of the testatrix in which she referred to the single diamond ring as her wedding ring was wholly inadmissible. Latent ambiguities have received the attention of our courts on several occasions. In Re Estate of Donnellan, 164 Cal. 14, 20, 127 P. 166, 168, the court said: "Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguity resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will * * *." Here the contention was being made that there were two rings exactly measuring up to the description and conditions of the will.

Section 105 of the Probate Code reads as follows: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omis-

sions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations." In re Estate of Dominici, 151 Cal. 181, 90 P. 448, says that such Code provisions limiting the scope of the evidence which may be received appears to be at variance with the general rule, and that it will not be extended, therefore, beyond its actual language, and "will be held to apply to mere incidental, fugitive utterances or declarations of intent" (page 450). The declarations of testatrix which were admitted in evidence were not declarations of the testatrix' intentions, and they were admissible for the purpose of identifying the ring which was referred to in the will merely as a "wedding ring".

Order affirmed.

We concur: WOOD, J.; McCOMB, J.



27 Cal.App.2d 345

SCHEEL et al. v. HARR et al.
Civ. 2227.

District Court of Appeal, Fourth District,
California.

June 28, 1938.

1. Mines and minerals §78(1)

A provision of mineral lease that it should terminate unless lessees should commence drilling and spudding in of well and diligently prosecute drilling to depth of 5,000 feet was not a "condition precedent" to effectuality of lease.

[Ed. Note.—For other definitions of "Condition Precedent," see Words & Phrases.]

2. Mines and minerals §78(3)

Under mineral lease providing that it should terminate unless lessees should com-

mence drilling and spudding in of well and diligently prosecute drilling to depth of 5,000 feet, or on lessees' violation of lease and failure to remedy such violation after 60 days' notice, where lessees' assignee drilled 26 feet and removed its drilling equipment, well was "spudded in," and lessors could not rescind or terminate lease or maintain action to quiet title against lessees and assignee without giving 60 days' notice, even if assignee had failed to prosecute drilling diligently.

The phrase "spudded in," as employed and understood by oil operators, denotes the first abrasion of the soil by the drill, or the first entrance of the drill into the ground.

[Ed. Note.—For other definitions of "Spudding In," see Words & Phrases.]

3. Mines and minerals §73

The execution of the ordinary oil lease immediately invests lessee with an interest in the land.

4. Contracts §94(1), 98

Fraud is a ground for rescinding a contract if perpetrated in its inception, but the contract is not void, and, once in effect, remains in effect until rescinded.

5. Contracts §85, 260

Failure of consideration is a ground for rescinding or terminating a contract, but the contract is not void, and, once in effect, remains in effect until rescinded or terminated.

6. Mines and minerals §58

Specific performance §58

A mineral lease giving lessees privilege of quitclaiming their interest to lessors on lessees' default, and on payment of certain sum by lessees, lacked mutuality, and was not specifically enforceable. Civ.Code, § 3386.

7. Contracts §215(1)

An option, when supported by consideration, can only be terminated by expiration of time for which it is given or otherwise in accordance with its terms.

8. Mines and minerals §77

Evidence did not sufficiently establish that assignee of lessees under mineral lease had abandoned leased premises to authorize judgment quieting title in lessors, in lessors' action against lessees and assignee.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to quiet title by H. F. Scheel and another against P. W. Harr and others. From a judgment for plaintiffs, defendant Stanford Petroleum Corporation appeals.

Reversed.

Wild, Everts & Carlson and R. H. Reeve, all of Fresno, for appellant.

Claffin, Dorsey & Campbell, of Bakersfield, for respondents.

HAINES, Justice pro tem.

Respondents Scheel, in consideration of \$10 and certain royalties reserved, entered on July 8, 1936, into an oil lease with one P. W. Harr and Edward C. White, affecting lands belonging to respondents in Kern county, and by its terms running for twenty years from its date "and so long thereafter as oil or gas or casinghead gas or other hydrocarbon substances, or either or any of them, is produced therefrom in quantities deemed paying by lessee". The lease was assigned by Harr and White to the Diane Company, a copartnership, and by it to appellant, Stanford Petroleum Corporation, of which White was the president and principal stockholder. The lease provided in paragraph "4" except in certain contingencies which have not occurred, that:

"This lease shall terminate as to all rights and obligations contained hereunder unless the Lessee shall on or before November 1st, 1936, commence the actual drilling and spudding in of a well for oil or gas on the above described land, and prosecute the drilling thereof with due diligence and dispatch until a depth of 5000 feet has been reached. * * *"

As is usual in documents of this description there are numerous other provisions and covenants. Thus, there are provisions for drilling additional wells in the event of discovering oil in the first; provisions covering the rights of the parties in the event of discovery of oil in paying quantities on adjacent lands; provisions suspending the lessees' obligation to pump in case the price of oil should fall below given figures, or to operate in case of strikes or other causes beyond lessees' reasonable control; provisions for the keeping by the lessees of proper records and making them available to the lessors; provisions reserving to the lessors the

rights or surface grazing and requiring lessees to fence sump holes and other openings; provisions for the payment by the lessees of damages for injuries to stock, crops, trees, buildings, etc., from drilling operations, and for arbitration in the event of disagreement as to their amount; provisions forbidding drilling except under given conditions of wells within a certain distance of dwelling houses; provisions permitting lessees to quitclaim all or any part of the leased premises; provisions for payment by lessees of certain taxes; provisions for surrender and quitclaiming of the property by the lessees upon the expiration of the term or other termination of the lease; provisions protecting the lessors against liens; provisions for warranty by the lessors of title; provisions for prorating royalties between the lessors and others who may be interested in the fee; provisions permitting either party to make assignments, defining drilling operations; providing the manner of making payments under the lease, and making the terms of the lease binding on the successors in interest of the original parties, and providing for the division of payments for damages to crops between the lessors and agricultural tenants, etc.

The paragraph numbered 18 of the lease which follows certain of these provisions and precedes others is to the effect that:

"Upon the violation of any of the terms or conditions of this lease by the Lessee and the failure to remedy the same within sixty days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end, save and excepting as to any and all wells producing or being drilled and in respect to which Lessee shall not be in default, and saving and excepting rights-of-way necessary for Lessee's operations, provided, however, that the Lessee may at any time after such default, and upon payment of the sum of Ten Dollars (\$10.00) to the Lessor as and for fixed and liquidated damages quitclaim to the Lessor all of the right, title and interest of Lessee in and to the leased lands in respect to which it has made default, and thereupon all rights and obligations of the parties hereto one to the other shall thereupon cease and terminate as to the premises quitclaimed."

The evidence shows that on July 9, 1936, respondents Scheel on the one hand, and

said Harr and White on the other entered into a written escrow arrangement with the Bakersfield Abstract Company, the effect of which was that the Scheels placed the lease in escrow to be delivered to Harr and White when the abstract company could write a title guarantee showing title to the land to be in the condition agreed upon. Harr and White on their part placed in escrow a thousand dollars. The escrow arrangement provided that if, on or before November 1, 1936, the abstract company should be informed by affidavits of one Brown and one Oddous that the lessees or their assigns had actually "spudded in" a new well on the premises, then the thousand dollars should be returned to Harr and White, but if the affidavits of Brown and Oddous should state that neither the lessees nor their assigns had "spudded in" a well, then the thousand dollars should be paid to the Scheels.

Respondents' claiming that the terms of the lease had not been complied with, brought the present action to quiet title against Harr, White, one Cohen, who apparently had some connection with the lessees, and appellant Stanford Petroleum Corporation, on December 11, 1936, without undertaking as a prerequisite to proceed under the above-quoted paragraph 18 by serving any notice either on the lessees or appellant as their successor to proceed within the sixty days therein mentioned to perform the lessees' part of the agreement.

After answer filed the case was tried and the court found upon sufficient evidence that prior to the first day of November, 1936, appellant corporation erected an oil well derrick on the leased land and installed an incomplete drilling rig thereon and with such rig on November 1, 1936, drilled to a depth of 26 feet only, and thereafter, on or about November 5, 1936, removed from said derrick the drilling equipment and has never resumed drilling on said land; that such drilling by appellant corporation was not in good faith, but was done for the purpose of securing the release from escrow of the above-mentioned one thousand dollars. The court concluded as a matter of law that for noncompliance with paragraph 4 of the lease the latter was terminated and respondents entitled to have their title quieted as against the defendants in the action, including the appellant corporation. Judgment was entered accordingly and the present appeal followed.

The only question before us is whether or not respondents were required, as a prerequisite to commencing this action to quiet title, to give to appellant as the holder of the lease a notice under the above-quoted provisions of paragraph 18 thereafter to perform its terms, and thereupon, before proceeding further, to allow it sixty days in which to do so. On appellant's part the claim is that the lease had gone into effect, and any failure on appellant's part in its performance would amount at the most to a condition subsequent and terminate it only in the circumstances contemplated by the said paragraph 18, that is, the failure to perform within sixty days after notice of default given. Respondents take the position that appellant, never having in good faith commenced operations, as required, a condition precedent to the effectiveness of the lease failed of performance; that in any event the above-quoted language of paragraph 4 provides for the termination of the lease ipso facto upon noncompliance with an essential condition, whereas the provisions of paragraph 18 above referred to provide merely for an optional feature for breach of subordinate covenants; that the more specific provisions of paragraph 4 control the more general provisions of paragraph 18; that appellant's default of itself terminated whatever rights appellant might have had under the lease; and that it was competent to begin and prosecute the present action without the service of any notice; in addition to which it is claimed that appellant has effectually abandoned the leased premises and for that further reason can assert no rights under the lease.

[1,2] We are unable to agree that the above-quoted language from paragraph 4 of the lease creates any condition precedent to its becoming effectual. No condition precedent is there expressed. What the paragraph does say is that the lessees' failure to comply with its requirements shall "terminate" the lease. That is language appropriate not to a condition precedent but to a condition subsequent. Neither can we agree that the language quoted from paragraph 4 controls that quoted from paragraph 18. It seems to us that the contrary is true. So far as the actual "spudding in" of the well was concerned, there is no question that it was done within the time which the lease contemplated. As said in *Solberg v. Sunburst Oil & Gas Co.*, 73 Mont. 94, 235 P. 761-763:

"The phrase 'spudded in,' as employed and understood by oil operators denotes the first abrasion of the soil by the drill, or that of first entrance of the drill into the ground." (Citing Morrison-DeSoto Oil & Gas Rights, p. 978.)

The further requirements of paragraph 4 were that the lessee should prosecute the drilling with due diligence and dispatch until a depth of 5000 feet should have been reached, etc., and it is that which was not done. This was not something that had, under the terms of the lease, to be done on or before any particular date. It was something that, in any circumstances, would require some time. In view of the necessity of reading paragraphs 4 and 18 together, and of the unqualified language of section 18, as respects its requirement of the 60-day notice to perform, to be given to the lessees in the event of their default, as a prerequisite to the termination of the latter's rights, we think that at least after drilling had once commenced, the well been "spudded in", and thereby the only condition subsequently tied to any stated date had ceased to figure in the case, the provisions of section 4 having to do with the termination of the lease if the work were not diligently prosecuted, were as much subject to the requirement of the 60-day notice to perform as any other terms or conditions contained in the instrument.

We think there is a distinction between the grounds for termination of the lessees' rights and the method prescribed for effectuating such termination, and that as between general and specific provisions, paragraph 18 is, as to the method of effectuating the termination, at least after the acts specified as to be done on or before November 1, 1936, had once been done, the only specific provision to be applied, and that it must therefore control. We find nothing in paragraph 18 excepting defaults accruing under paragraph 4 from its requirements.

Not only, as we have said, is there nothing in paragraph 4 of the lease in the nature of a condition precedent to the effectiveness of the instrument, but it cannot, so far as we can see, be claimed that for any other reason the right of the lessees to proceed under it did not come into initial effect. While, upon being signed, it was left in escrow, yet no other condition was attached to the right of the lessees to receive delivery of it from the escrow holder than that the latter should be able to write the

contemplated guarantee of title, and there is no claim that this could not be done. The right of the lessees to the lease was in no way conditioned on the disposition of the thousand dollars deposited by them with the abstract company.

Contrary to the earlier views expressed in *Brookshire Oil Co. v. Casmalia, etc., Co.*, 156 Cal. 211, 215, 103 P. 927, it is laid down in *Callahan v. Martin*, 3 Cal.2d 110, 122, 43 P.2d 788, 794, 101 A.L.R. 871, that:

"Under the usual oil and gas lease, the owner-lessor transfers to his lessee the right to drill for and produce oil and other substances. The rights of the lessee present a clear case of a profit à prendre in gross, a right to remove a part of the substance of the land. If the oil and gas lessee is not granted exclusive possession of the surface by the terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which, in fact, may preclude any other surface possession. This profit à prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years."

To the same effect is *Dabney-Johnston Oil Corporation v. Walden*, 4 Cal.2d 637, 52 P.2d 237, and *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P.2d 962, 103 A.L.R. 822. In the last mentioned case, in discussing a lease, which, like the one in the case before us, was made for a fixed time and "so long thereafter as gas or oil or either of said substances is produced therefrom in quantities sufficient to pay to pump, or otherwise to secure and save * * *" (page 963), the court held the right vested in the lessee to amount to a freehold estate in the nature of a determinable fee (page 12, 53 P.2d page 967) and said (pages 14, 15, 53 P.2d page 968):

"The doctrine that the lessee's interest is inchoate and does not vest until the discovery or production of oil or gas was expressly repudiated in the recent case of *Callahan v. Martin* [3 Cal.2d 110] 43 P.2d 788 [101 A.L.R. 871]. It is true that the physical power to produce oil or gas does not come into being until the time that a well is drilled and oil or gas is obtained therefrom, but the right or privilege to produce undoubtedly vests upon the execution of the lease."

[3] It must then be considered and held that, in general, the execution of an oil

lease of the description commonly in use immediately invests the lessee with an interest in the land, whether, according to the terms of the lease, the interest amount only to a chattel real or be in itself real estate.

With these principles in mind, then, we trial court's finding that such operations as are brought to consider the effect of the appellant did conduct on the premises involved, were not in good faith. Where no substantial cash requirements are involved the courts have said, as indeed must be the case, that the real consideration for an oil lease is the right therein contained for the lessor to profit from the exploitation of the mineral resources of the property, in fine, his right to have the effort to find and produce oil proceed and in some sort to share in the benefits consequent on its being, if possible, found and produced. *Caswell v. Gardner*, 12 Cal.App.2d 597, 601, 55 P.2d 1222, quoting *Hall v. Augur*, 82 Cal.App. 594, 256 P. 232.

It may then for the purposes of this decision be assumed that the court's finding that appellant's operations were not in good faith is tantamount to a finding both that the appellant was guilty of fraud, and further that the consideration running to respondent for the lease, has, by reason of appellant's breach, failed. But even though all this be true, it does not seem to us to dispense with the requirement of paragraph 18 that the 60-day notice be given as a prerequisite to making effective the termination of the lessees' rights.

[4, 5] An instrument procured by fraud is not a void instrument; neither does the failure of consideration render a transaction a nullity from the beginning. Fraud, if perpetrated in its inception is a ground for rescinding a contract and the failure of consideration is a ground for either rescinding or terminating a contract, according to circumstances, but until rescinded or terminated a contract once in effect re-

mains in effect. In the instant case there has been no attempt to rescind and respondent has chosen not to follow the method of effectuating a termination prescribed by the language quoted from paragraph 18.

[6] It is true that in the present case, by reason of the privilege reserved to the lessee to quitclaim at any time, the instrument here involved lacks mutuality and its specific performance could not, therefore, be enforced. Civil Code, § 3386; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am.Rep. 239; *Dabney v. Key*, 57 Cal.App. 762, 207 P. 921; *Sheehan v. Vedder*, 108 Cal.App. 419, 292 P. 175; *George v. Weston*, Cal.App., 79 P.2d 110.

[7] In that aspect we agree that the document here involved is not analogous to a lease in the ordinary sense, but to an option; that is to say that it is so far unilateral that it could be at any time terminated by the lessees or be now terminated by appellant as their successor in interest. But even an option, when supported by any consideration at all—and this recites one of \$10—can only be terminated by expiration of the time for which it is given or otherwise in accordance with its terms.

[8] With respect to the suggestion that appellant has abandoned the premises it is our opinion that the evidence is insufficient to justify that construction of the appellant's conduct. *Utt v. Frey*, 106 Cal. 392, 39 P. 807; *Herbert v. Graham*, 72 Cal.App. 314, 237 P. 58.

Since in the instant case respondents have taken no appropriate measures for effectuating the termination of appellant's rights, their present action is in our opinion premature and for that reason the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

27 Cal.App.2d 384

HALLFORD et al. v. BAIRD et al.

Civ. 1841.

District Court of Appeal, Fourth District,
California.

June 30, 1938.

1. Account stated $\Rightarrow$ 14

An action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties, since the account stated alters the nature of the original indebtedness and is in the nature of a new promise or undertaking.

2. Account stated $\Rightarrow$ 1

The term "stated account" is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note or other contract having a like consideration for its support.

[Ed. Note.—For other definitions of "Stated Accounts," see Words & Phrases.]

3. Account stated $\Rightarrow$ 19(3)

Evidence held insufficient to sustain finding that on particular date alleged or on any other date there was an account stated between seller and buyer upon which buyer was liable.

4. Account stated $\Rightarrow$ 5, 6(2)

A bill from grocers to customer stating amount of bill and inquiring as to best way to take care of account to which customer replied that only thing she could suggest was to write to husband from whom she was separated was not converted into an account stated as being expressly assented to as correct without further comment or by failure to object within a reasonable time.

5. Account stated $\Rightarrow$ 5, 6(2)

When one renders a bill to another, the latter may convert it into an account stated, either by expressly assenting to it as correct without further comment, or by failure to object to it within a reasonable time.

against Alexander B. Baird and Doris Baird. Judgment for the plaintiffs for \$1,450.40 against the last-named defendant, and she appeals.

Reversed.

Max B. Jamison, of Porterville, for appellant.

Halbert & Stone, of Porterville, for respondents.

HAINES, Justice pro tem.

The present action was commenced by respondents S. A. Hallford and J. F. Hallford, as partners, doing business under the firm name of Hallford's, against Alexander B. Baird and appellant Doris Baird, who were formerly husband and wife, to recover \$1,450.40 alleged to be due as of April 24, 1933, on an account stated, with legal interest thereon from that date. The answer denies the account stated and as part of a separate defense alleges that the action is barred by subdivision 2 of section 337 of the Code of Civil Procedure. Other matters alleged in the second defense are not insisted upon in the briefs and we need not, therefore, consider them.

Respondents have, for a number of years, conducted a grocery store at Porterville, California. The Bairds, then husband and wife, began to purchase groceries from them in 1928 and continued to do so until July 10, 1931, when the two separated. At that time there remained unpaid to respondents on an open account, for the groceries so purchased, a balance of \$1,150.40. After the Bairds separated Mrs. Baird continued to trade with respondents until March, 1933, when she went to live with her parents. In the interval respondents made charges for the groceries which she bought, but her father, one Murphy, paid, in her behalf, for each month's purchases within the succeeding month. Respondents claim to have, from time to time, mailed to Mrs. Baird statements of the balance due them on the old account in connection with her current purchases, upon a form of bill stating that interest would be charged at one per cent per month after thirty days.

The evidence shows that a statement known in the record as Defendants' Exhibit 1 addressed by respondents to "Mrs. Alec Baird" which her father says came to him through the mail with his own bill, covering her purchases for August, 1931, contained at the bottom the words and

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action on an account stated by S. D. Hallford and another, doing business under the firm name and style of Hallford's,

figures: "Bal. \$1150.36," manifestly referring to this old account, and followed by a total in which it is added to the account for August. There is no evidence other than that it is addressed to her that Mrs. Baird ever personally saw this statement. Her father testified that about this time respondents sought to have him take the responsibility for this old account but that he refused to do so, telling them in substance that he would merely take care of his daughter's current monthly bills. Monthly statements rendered by respondents and addressed to Mrs. Baird for September, 1931, and October, 1931, which her father says that he got, are in evidence. In each of these the old balance of \$1,150.-40 seems to have been inserted at the end and carried with the month's account into a total, but both the old balance and this total are in these latter two bills typed out, whether because of the conversation which Mr. Murphy says he had with respondents, or otherwise, we do not know. Respondents manifestly cannot rely on these three old statements as amounting to any account stated between the parties for various reasons. In the first place, no reliance is placed upon them in the pleadings; in the second place, they vary from the account now sued on in that no interest was included in them; in the third place, any account stated as of 1931 would have long since been barred by the statute of limitations. The last payment made by Mr. Murphy on appellant's behalf was on April 24, 1933. At the time she ceased to trade with respondents no part of the old balance of \$1,150.40 had been paid and there had accrued thereon at least \$300 of interest, making an aggregate of not less than \$1,450.40. There has been no subsequent change in the amount of this account, which has always been carried on the books in the name of Alexander B. Baird.

J. F. Hallford, one of the respondents, says that he mailed a statement to Mrs. Baird in care of her father, George Murphy, at a date referred to at points in his testimony as April 23, 1933, and elsewhere as April 24, 1933. Both he and respondents' bookkeeper, a Mrs. Hammond, who made out the bills, were very uncertain in their testimony as to whether this particular statement contained anything relating to the old balance, or not. The monthly bill which would cover March, 1933, was paid in Mrs. Baird's behalf on April 24, 1933, by her father, Murphy. J. F.

Hallford, as well as Mrs. Hammond, testified that statements of the balance remaining due were mailed to Mrs. Baird at various times after she ceased to trade at respondents' store. Mrs. Hammond says that these were directed to Doris Baird, sometimes in her father's care and sometimes at her street address. Mrs. Baird admits the receipt from time to time of bills covering her monthly purchases while she continued to trade with respondents, but denies ever herself seeing any bill which included the old balance until February 1, 1935, at which time it is admitted that she received through the mail a statement from respondents in the words and figures following:

"Porterville, Calif., Feb. 1st, 1935. Mrs. Doris Baird, c-o Geo. C. Murphy Porterville, Calif. In account with

"Hallford's Grocery

"'Good things to eat'

"502 Main St. Term 30 days

"Phones 740-741

"Bill Rendered \$1450.40

"What do you think the best way to take care of this account? Please let me have your answer as quickly as possible.

"Hallford."

This Mrs. Baird returned to respondents with the following written by her at the bottom:

"The only thing I can suggest is for you to write to Mr. Baird. I am giving you his address as he sent it to Beverly. I cannot do anything about it myself as I haven't any income of my own and will not ask Dad to pay it.

"Sincerely,

"Mr. Alec B. Baird,

"Casilla 412

"Valdivia,

"Chile, S. A.

Doris Baird."

It is not claimed that Mrs. Baird made any objection to the account other than this memorandum, nor is it really claimed that the amount of the account is incorrect, except as there may be some concession on respondents' part with respect to the amount of interest included as part of it.

The trial court, inter alia, found:

"That it is true that within four years last past, to wit, on the 24th day of April, A. D. 1933, that the defendant, Doris Baird, became indebted to the plaintiffs in this action on an account stated for goods, wares and merchandise, sold and delivered

by said plaintiffs to said defendants. Doris Baird and *Alexander B. Baird, and charged to the Alexander B. Baird account, husband of Doris Baird*, at an agreed price, at the special instance and request of said defendants, *Alexander B. Baird*, Doris Baird and *their* family, and that the balance now due owing and unpaid from said defendant, Doris Baird, to the plaintiffs herein on said account stated is the sum of Fourteen Hundred and Fifty and 40-100 (\$1450.40) Dollars; (The portions of this paragraph italicized were added at the request of the defendant, Doris Baird.)"

It was also found that when these obligations were incurred the Bairds were husband and wife; that it was Doris Baird who actually contracted the debt and that the same was for necessities of life, to-wit, groceries, and that the cause of action against Doris Baird is not barred by the statutory provision pleaded, nor by any law of the state. Judgment was given in the plaintiffs' favor against Doris Baird for the \$1,450.40 sued for, plus \$327.14 interest accrued since April 24, 1933; from which judgment she takes the present appeal.

[1,2] The general principles applicable where reliance is placed on an account stated have been long and thoroughly settled and understood. "An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking. * * * An action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." *Carey v. Philadelphia & C. Petroleum Co.*, 33 Cal. 694, 696, 697. "The term 'stated account' is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note or other contract having a like consideration for its support." *Auzerais v. Naglee*, 74 Cal. 60, 64, 15 P. 371, 372. To like effect are *Hendy v. March*, 75 Cal. 566, 568, 17 P. 702; *Baird v. Crank*, 98 Cal. 293, 33 P. 63; *Griswold v. Pieratt*, 110 Cal. 259, 42 P. 820; *Converse v. Scott*, 137 Cal. 239, 70 P. 13; *Kearney v. Bell*, 160 Cal. 661, 669, 670, 117 P. 925; *E. W. McLellan Co. v. East San Mateo L. Co.*, 166 Cal. 736, 740, 137 P. 1145; *Gardner v. Watson*, 170 Cal. 570, 574, 150 P. 994; *Merchants' Nat. Bank v. Carmichael*, 178 Cal. 446, 448, 173 P. 999; *Bennett v. Potter*, 180 Cal. 736, 745, 183 P. 156; *Duerr*

v. Sloan, 40 Cal.App. 653, 181 P. 407; *Henning v. Clark*, 46 Cal.App. 551, 189 P. 714.

We have then to inquire to what extent, if at all, these requisites were met by respondents' proof. We have already mentioned the circumstance that neither J. F. Hallford nor Mrs. Hammond, the bookkeeper, who were respondents' only witnesses on the subject, other than appellant herself, appear to be at all certain that the particular statement which was, on either April 23 or April 24, 1933, mailed to Mrs. Baird, made any mention of the old \$1,150.40 balance. Besides that, neither of these two witnesses mention having said anything therein about any item of \$300 interest, though the trial court may have been justified in believing that whatever statement at that time was rendered was sent on a bill form in the heading of which the intention to charge interest on accounts overdue above thirty days was stated; and there is on the respondents' books an item of \$300 interest placed at the end of the Alexander B. Baird account which Mr. Hallford says that he figured on the "approximate basis of 7% for about 3 3-4 years" on the "full amount". Mr. Hallford's testimony with respect to this statement included the following:

"Q. Well, did you mail Mrs. Alexander Baird a statement of this account on April 23rd, 1933? * * * A. Yes.

"Q. And where was that mailed? A. In care of George Murphy.

"Q. Care of George Murphy, and that statement at that time, did it include the monthly bill? A. Yes.

"Q. And did Mr. Murphy pay that bill that month? A. That month, yes. * * *

"Q. And was the balance shown in the account at that time? A. I do not recall whether it was at that particular time, but it did show from time to time, and it had been regularly shown on the —"

Again he testified:

"Q. Well now you do not recall whether you made or mailed a statement to Mrs. Alexander Baird on the 24th day of April, 1933, do you? A. At that time a statement was sent if there was a purchase during that month.

"Q. Well, if that was sent, it was sent to Mr. Murphy? A. In care of Mr. Murphy.

"Q. And you do not know whether that contained the balance on it? A. I do know that that particular one did."

It seems probable that there is a clerical omission of the word "not" in the last answer, because no claim is made that there were two April statements mailed, one on the 23d and another on the 24th, and shortly thereafter the witness proceeded as follows:

"The Court: You say the statement you sent April 23rd, 1933, you do not know whether that stated the balance due or not? A. The last statement, I do not know whether the last one did or not."

Again he testified:

"Q. You do not know on April the 24th, whether this balance of the account that was due on April, or in August, 1931, was carried forward on this account or not? A. I do not remember."

In rebuttal J. F. Hallford on direct examination testified as follows:

"Q. Mr. Hallford, do you know, or have you any independent recollection as to whether the statement of the account carried in the name of Alexander Baird in your office was sent during the month of April, 1933? A. It was."

"Q. Was it sent? A. Yes."

And on cross-examination: "Well, to whom was that account sent? A. Mrs. Alexander Baird in care of George C. Murphy."

It does not appear that after the Bairs separated any change was made in the manner in which the purchases as they continued to be made were charged on the books. In referring to this statement of the account carried in the name of Alexander B. Baird, therefore, the witness is not necessarily to be understood as making any reference to the old balance, nor to be undertaking to repudiate his earlier statement that he did not know whether the old balance was included in the account at this time rendered or not.

Mrs. Hammond's statement on the subject, appearing in her cross-examination, is as follows:

"Q. But you do not know whether the one (statement) in April, mailed out in April 1933, contained any balance on the account? A. I do not."

Respondents say in their brief that: "The balance on the old open book account which defendant and appellant had main-

tained with the plaintiffs and respondents was struck on or about April 24th, 1933, immediately after the last payment was made on it."

This is as much as to say that it had not yet been struck when this statement was rendered, since the payment was manifestly made in response to the statement. What evidence, if any, is there that it ever was so struck? We find none that it was struck as of any date anywhere near April 24, 1933, except as the amount of the balance may be said to have become ascertainable as a matter of law when the last payment was made. That, of course, is not the same thing as a showing that it was communicated to Mrs. Baird or assented to by her. J. F. Hallford and Mrs. Hammond do indeed claim, as we have seen, that statements of the old balance were, at frequent intervals thereafter mailed to Mrs. Baird, all of which she denies. But except for the statement finally sent on February 1, 1935, respondents have been unable to inform us of any date between April 23 or 24, 1933, and February 1, 1935, on which a single one of these supposed statements was mailed, or to furnish any copy of any one of them, or even to tell us verbally of the exact contents of a single one. Neither does it appear that respondents even claim that in any one of these statements the interest on the unpaid \$1,150.40 had been in any way computed or added to the principal, so as to make the aggregate total of \$1,450.40. Neither is there any evidence that any conversations were had between appellant and respondents in respect to any such statements.

[3] The evidence then being, for the reasons that we have given, manifestly insufficient to support findings that there was on the particular date alleged, that is, April 24, 1933, any account stated between respondents and appellant, we are confronted with the fact that the pleadings do not assert that there was any statement of account as of any other date. Moreover, since we do not have copies of any statements that respondents may have sent to Mrs. Baird between April 24, 1933, and February 1, 1935, nor any verbal testimony sufficient to give us with exactitude the contents of such purported statements, if such there were, the evidence seems to us insufficient to sustain a finding of any agreement, express or implied, upon any account during the interval.

To be sure, it has been held that a variation of a few weeks or even months between the date alleged in a complaint as that of an account stated, and the date on which the court finds that it was stated, is not necessarily fatal. *Young v. LoPresti*, 95 Cal.App. 79, 84, 85, 272 P. 310. In the instant case, however, there is no finding that any account was stated at any other time than April 24, 1933.

[4,5] We come then to the effect to be given to the bill sent by respondents to appellant, Doris Baird, on February 1, 1935, and of her reply to it. In the first place, the pleadings in no way count on this as the basis for the alleged account stated. Moreover, even though it is not mentioned either in the pleadings or the findings, if we were able to treat it as being the statement of account here involved, there would still remain the difficulty that appellant has not agreed to pay it. As a matter of law, indeed, when one renders a bill to another, the latter may convert it into an account stated, either by expressly assenting to it as correct without further comment, or else by failure to object to it within a reasonable time. In either event the law, if he has not expressly promised to pay it, will, there being no repudiation by him of responsibility for it, imply such promise on his part. That is the new contract referred to in some of the cases to which reference has already been made. But in the instant case, though it be true that appellant made no objection to respondents' bill of February 1, 1935, as correctly stating the balance then due, she by her writing at the bottom of it expressly declined to take any responsibility for its payment and referred respondents to her former husband. This seems to us to rebut any possible implication that the law might otherwise raise from her failure to object to its amount of any promise on her part to pay it. In our opinion, then, the evidence is insufficient to justify any finding that there has been any such thing at all as an account stated, in the sense of any new contract between Mrs. Baird and the respondents for payment by her of the sum sued for or any part of it.

It is true enough that if there were evidence to sustain the finding that there had been such account stated as of April 24, 1933, or if it had been pleaded and found that such account was stated at any time subsequent to that, the action would not be barred by subdivision 2 of section 337 of

the Code of Civil Procedure or any other applicable statute.

However, in view of what has already been said, we are constrained to hold that the cause of action stated in the complaint has not been proved. The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



27 Cal.App.2d 319

HAASE et al. v. CENTRAL UNION HIGH SCHOOL DIST. et al.

Civ. 1862.

District Court of Appeal, Fourth District,
California.

June 25, 1938.

Rehearing Denied July 21, 1938.

Hearing Denied by Supreme Court
August 22, 1938.

1. Appeal and error ☞1097(1)

The doctrine of the law of the case persists as a general rule of practice and procedure, notwithstanding modern tendency of reviewing courts to raise exceptions thereto, particularly in cases where strict adherence to principle would produce manifestly unjust results.

2. Appeal and error ☞1097(1)

When adjudication is made upon certain state of facts, there must be substantial identity of facts on subsequent appeal in order that doctrine of law of the case shall be applicable.

3. Schools and school districts ☞89

In action against school district and schoolbus driver for injuries sustained by boy while riding in schoolbus when his arm was struck by box which fell from truck which bus met on bridge, if bus was driven in such manner that part of it was on driver's left side of highway at time of accident, driver was guilty of negligence per se. St.1931, p. 2124, § 122.

4. Appeal and error ☞524

Where a blackboard diagram in action for injuries resulting from collision between schoolbus and truck on bridge was not strictly introduced in evidence but was used to illustrate testimony of witnesses, diagram was as much a part of testimony of

witnesses as words they uttered when referring to it, and appellant should have had such diagram photographed and thus reproduced in record on appeal.

5. Appeal and error ⇨907(5)

An appellant has duty to produce a complete record and any omitted portion must be construed on appeal as supporting verdict or finding and judgment, which rule includes missing drawings or diagrams.

6. Schools and school districts ⇨122

In action against school district and schoolbus driver for injuries sustained by boy while riding in schoolbus when his arm was struck by box which fell from truck which bus met on bridge, evidence that on leaving bridge driver turned his bus so sharply to his right that its overhanging rear protruded over on left-hand side of roadway and into the path of the truck, required submission to jury of issue of bus driver's negligence. St.1931, p. 2124, § 122.

7. Appeal and error ⇨1099(7)

The decision of court reversing judgment against school district and schoolbus driver for injuries sustained by boy while riding in schoolbus when his arm was struck by box which fell from truck which bus met on bridge, on ground that evidence did not support finding of negligence on part of bus driver, was not law of the case in subsequent trial wherein additional testimony showed that driver turned his bus so sharply to his right that its overhanging rear protruded over on left-hand side of roadway and into path of the truck.

8. Trial ⇨191(7)

In motor vehicle collision case, an instruction that plaintiff to recover must establish that alleged negligence was "the proximate cause of said collision and injury, if any, plaintiffs received thereby," was not erroneous on ground that instruction assumed fact of collision which was one of controverted questions, since words "if any" modified phrase preceding them and left questions of both collision and injury to jury.

[Ed. Note.—For other definitions of "If Any," see Words & Phrases.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Albert Haase, by his guardian, Edna M. Van Ness, and Edna M. Van Ness

against the Central Union High School District and another for injuries sustained by first named plaintiff while riding in a school bus. From a judgment for plaintiffs and from an order denying a motion for entry of judgment in defendants' favor notwithstanding the verdict, defendants appeal.

Judgment and order affirmed.

Dan F. Conway, Dist. Atty., and Dearing & Jertberg, all of Fresno, for appellants.

Ray W. Hays, of Fresno, for respondents.

MARKS, Justice.

The quoted paragraphs of this opinion were written by the late Mr. Justice Jennings and are adopted by us.

"The plaintiffs instituted this action to recover damages for personal injuries sustained by the minor plaintiff as a result of an alleged collision which occurred between a motor truck and a school bus, owned by the defendant school district, in which said minor was riding as a passenger, and for loss sustained by Edna M. Van Ness, mother of the minor, in treating his injuries. At the time the injuries were sustained the school bus was being driven by the defendant DeVelbiss, an employee of the school district. It was alleged in plaintiff's complaint that the proximate cause of the injuries' for which compensation was demanded was the negligence of the defendant DeVelbiss in operating the bus and liability therefor was sought to be imposed on the school district under the doctrine of respondeat superior. Trial of the action was had before a jury. At the conclusion of plaintiffs' case the defendants moved for a nonsuit. This motion was denied. After all evidence in the case had been submitted and both sides had rested, the defendants move the court for a directed verdict in their favor. This motion was likewise denied. The case was then given to the jury, which returned a verdict in favor of the plaintiffs. The defendants thereupon moved the court to enter judgment in their favor notwithstanding the verdict. Upon the denial of this motion the defendants moved for a new trial, which was denied. Judgment in conformity with the verdict was entered. From this judgment and from the court's order denying the motion for entry of a judgment in their favor notwithstanding the verdict the defendants present this appeal.

"The trial wherein the judgment from which this appeal has been taken is a second trial of the same action. Upon the first

trial, which was likewise had before a jury, a judgment was rendered in favor of the plaintiffs against the same and other defendants. An appeal was thereupon taken from said judgment by the defendants now appealing to this court. The judgment was reversed as to them on the ground that the jury's finding that the defendant DeVelbiss was guilty of negligence was not supported by the evidence. *Haase v. Central Union H. S. Dist.*, 15 Cal.App.2d 102, 59 P.2d 193. (The other defendants did not appeal and the judgment as to them became final.)

"The chief contention here advanced by appellants for reversal of the judgment and order is that the decision of this court on the former appeal established the law of the case. In answer to this the respondents maintain that the doctrine of the law of the case is applicable only to questions of law, that it is not the function of an appellate court to pass upon questions of fact, and that a decision of such a court as to a question of fact does not become the law of the case.

[1,2] "Various reasons have been assigned by the courts for the existence of the doctrine of the 'law of the case'. In *re Estate of Baird*, 193 Cal. 225, 233, 223 P. 974; 2 Cal.Jur. p. 949. No useful purpose would here be served by their restatement. It is sufficient for the purpose of this opinion to recognize that the doctrine is established as a legal principle and that, despite the modern tendency of reviewing courts to raise exceptions thereto, particularly in cases where strict adherence to the principle would produce manifestly unjust results, the doctrine has nevertheless not been abandoned but persists as a general rule of practice and procedure. *United Dredging Co. v. Industrial Accident Commission*, 208 Cal. 705, 712, 284 P. 922. There is, however, a settled limitation upon the doctrine which must be taken into account. This qualification is that when an adjudication is made upon a certain state of facts there must be substantial identity of facts on a subsequent appeal in order that the doctrine shall be applicable. *Hoffman v. Southern Pacific Co.*, 215 Cal. 454, 457, 11 P.2d 387; *Sheets v. Southern Pacific Co.*, 1 Cal.2d 408, 411, 35 P.2d 121. * * *

"The problem here presented, therefore, is to discover whether or not there is such substantial difference between the facts disclosed by the record on this appeal and those upon which the former decision of this court was based as to render inapplicable the heretofore mentioned doctrine. We deem it

unnecessary to include herein a restatement of the facts which appeared in the former opinion since ready reference thereto is available and no question is raised as to the correctness of such statement. Respondents specify certain points of difference which they maintain exist in the factual background of the two trials and contend that thereby substantial factual dissimilarity is presented to render inapplicable to this appeal the aforesaid doctrine. It will, therefore, here suffice to consider these claimed points of factual dissimilarity for the purpose of determining whether or not the contention of respondents is correct."

A careful study of the evidence on the two appeals shows little material difference except in one particular, which consists of a blackboard diagram drawn by counsel during the second trial and upon which DeVelbiss charted the wheel tracks of his bus when crossing the bridge and after the front end had left it. This diagram is not reproduced in the record.

During the first trial a map was used upon which the witnesses charted the courses of the truck and the bus. It showed the truck approaching the bridge from the west and traveling in a southeasterly direction so that it left the bridge near the east end of the south rail. The course of the bus was shown approaching from the east and crossing the bridge on a straight line which bore slightly to the north, or the driver's right, and leaving the west end of the bridge near the north rail. The straight line indicating the course of the bus was extended slightly beyond the west edge of the bridge floor, indicating that the bus continued its course without change of direction when it left the bridge.

A study of the record in the first appeal left the cause of the accident a mystery. We there concluded that there was a failure in the evidence to disclose any act of negligence on the part of DeVelbiss that was a proximate or a concurring cause of the accident. A further study of the first record again confirms us in that conclusion.

For the first time we find a probable reasonable explanation of the cause of the accident in the record now before us. The bridge was narrow and there could not have been more than between twenty and thirty-six inches between the vehicles while they were passing on the bridge, if proceeding on straight courses. The bus was approximately twenty-four feet long. Pictures of it in both records indicate that it had an

overhang, including a bumper, of between six and nine feet to the rear of the rear axle. If the bus made a sharp change in its direction the overhanging rear would have swung out in the opposite direction, the wheels and axle acting as an axis.

DeVelbiss was asked the question, "After you left the bridge you made a rather sharp turn to your right?" to which he answered, "I turned, yes."

We find in the record the following description of the drawing used at the trial:

"Mr. Jertberg (interrupting): Just a minute. I think for the purpose of the record that we ought to agree and if you can state it, I'll check you on what has been shown on the board by the witness. I don't know of any other way than that to get it in the record.

"Mr. Hays: Well, I think that this is what is shown, that he has drawn a single line—I will ask one further question—Both of those tracks that you saw were parallel with the rails on the bridge? A. Across the bridge, yes, sir.

"Q. As they crossed the bridge they were both parallel with the bridge? A. Yes, sir.

"Q. And there is no doubt in your mind about that? A. No, sir.

"Q. That he has drawn a single line which he estimates to be about a foot south of the north rail of the bridge, representing, I suppose that is the outside dual of your tracks? A. It had to be.

"Q. On the south side he has drawn a parallel line, estimated to be two or two and a half feet from the south rail of the bridge, that line being parallel with the rail, except as it enters the west end of the bridge—that—or what represents the west end of the bridge, which comes on at an angle and turns towards the north, and as his bus left the bridge, it shows that he had turned towards the north.

"Mr. Jertberg: Towards the north. That is, turned his—begins approximately where the wing on the west end of the north rail commences, is that true?

"Mr. Hays: That is the way he has drawn it, yes.

"The Court: All right."

If this turn of the bus to the driver's right, to the north, was made sharply it would have swung the overhanging rear portion to the south and out over the center line of the road, on to the half of the road on which the truck was traveling. There is

positive evidence in the record that the truck was at all times on its own half of the road.

[3] Section 122 of the California Vehicle Act, as amended by St.1931, p. 2124, in effect at the time of the accident, provided that "the driver of a vehicle shall drive the same upon the right half of the highway" subject to certain exceptions not important here. Therefore, if DeVelbiss drove the bus in such a manner that part of it was on his left side of the highway at the time of the accident he was guilty of negligence per se. It follows that if the implied finding of the jury, that negligence on the part of DeVelbiss was a proximate or concurring cause of the accident, is supported by the evidence, the contention of defendants that the evidence does not support the verdict cannot be sustained. And, further, if such implied finding be sustained it would follow that there are sufficient material differences in the evidence, submitted at the two trials, to prohibit our former holding from establishing the law of the case for the second trial.

Our study of the two records leads us to the conclusion that the question of whether or not the law of the case had been established by the first decision depends on what was shown on the blackboard drawing. That drawing is not in the present record. If that drawing showed that DeVelbiss made a sufficiently sharp turn to his right on leaving the bridge to throw the overhanging rear of the bus on to his left hand side of the road and into the path of the truck then the reasonable cause of the collision would have been established for the first time and the doctrine of the law of the case could not be invoked. If the turn was slight and its curve gentle then there is no material difference in the evidence at the two trials and our former holding that DeVelbiss was not negligent would be controlling here.

In speaking of a diagram or drawing used to illustrate the testimony of a witness the Supreme Court, in *People v. Cochran*, 61 Cal. 548, said:

"A diagram is not a public nor private writing, nor is it made by law primary, or secondary, or prima facie evidence of any fact or object represented by it. When used on the trial of a case, it is not used as evidence—it does not prove nor tend to prove, in the sense of evidence, any fact; it is simply a figure drawn to suggest to the minds of the jurors the relations between objects about which a witness is testifying, and may be drawn on paper or on a stationary black-

board, which can not be removed. The very construction of the figure itself is defined by the testimony of the witness, and as illustrative of his testimony it partakes of it, in the same way that the clearness of the expression of the witness partakes of his evidence; as such it was receivable by the jury, and was, in fact, taken with them upon their retirement, as much as any other part of the evidence."

In *People v. Crandall*, 125 Cal. 129, 57 P. 785, it was held that the value of a diagram must be determined by the jury from all of the evidence.

[4] It is, therefore, clear that the black-board diagram in this case, while not, strictly speaking, introduced in the evidence, was used to illustrate the testimony of witnesses and was therefore as much a part of their testimony as the words they uttered when referring to it. Appellants should have had such diagrams photographed and thus reproduced in the record on appeal. *Montanez v. Beard*, 108 Cal.App. 585, 291 P. 896. A record without such reproduction is defective and incomplete and does not contain all of the evidence which the jury had before it to consider.

[5] It is the duty of an appellant to produce a complete record. Any omitted portion must be construed on appeal as supporting the verdict, or findings and judgment. This rule includes missing drawings or diagrams. As was said in *Jackson v. Southern Pacific Co.*, 11 Cal.App. 101, 103 P. 1098, 1099: "There was a diagram of the well introduced in evidence which is not before us, and which, it is true, was a part of defendant's case, but which, if brought up, would be proper for us to consider in determining whether or not any lack of evidence in plaintiff's case had been cured by the evidence given by defendant. Evidence of location of an object dependent upon testimony which locates it by means of a diagram which is not brought up in the record must be assumed to have been most favorable to the view that supports the finding or verdict."

See, also, *Dilger v. Whittier*, 33 Cal.App. 15, 164 P. 49; *Godeau v. Levy*, 72 Cal.App. 13, 236 P. 354; *Truitner v. Knight*, 83 Cal.

App. 655, 257 P. 447; *Packer v. Wagner*, 109 Cal.App. 26, 292 P. 523; *Merrill v. Finigan*, 133 Cal.App. 101, 24 P.2d 188; *Wilmon v. Aros*, 191 Cal. 80, 214 P. 962.

[6, 7] We must, therefore, conclude that the missing diagram supported the verdict and judgment; in other words, that it showed that on leaving the bridge DeVelbiss turned his bus so sharply to his right that its overhanging rear protruded over on to the southerly half of the roadway and into the path of the truck. This is sufficient evidence of negligence on his part to support the verdict and judgment. As the evidence on the second trial differed from that on the first in this important particular, showing the negligence of DeVelbiss, there was a material difference in the evidence introduced in the two trials and our former decision did not establish the law of the case for the second trial and on this appeal.

[8] Defendants complain of the following instruction given to the jury: "You are instructed that the gist of this action is negligence, and that the plaintiffs before they are entitled to recover must establish negligence as alleged in the complaint, and that such negligence was the proximate cause of said collision and injury, if any, plaintiffs received thereby."

They urge that the question of a collision occurring was one of the controverted questions in the case and that the instruction assumed the fact of such a collision. We do not so construe it. The words, "if any", modify the phrase preceding them and leave the questions of both the collision and the injury to the jury.

Lastly, defendants urge that the trial court erred in denying their motion for judgment notwithstanding the verdict and their motion for new trial because both were made on the grounds of lack of proof of negligence on their part. What we have already said on the question of proof of negligence of DeVelbiss sufficiently answers these contentions.

The judgment and order appealed from are affirmed.

I concur: BARNARD, P. J.



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